No. (1)

91-1496

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In the Supreme Court of the United States

October Term, 1991

In Re: Carolina Motor Express, Inc., Fed. I.D. No. 56–1299892, Debtor.

PETER C. REITER, PETITIONER,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC.;
MARK & ASSOCIATES OF NORTH CAROLINA, INC., RESPONDENT.

CALIFORNIA CONSOLIDATED ENTERPRISES, INC., PETITIONER,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC.;
MARK & ASSOCIATES OF NORTH CAROLINA, INC., RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Robert J. Gallagher, Esq.
17 New South Street
Northampton, MA 01060
(413) 586–1994
Counsel of Record for Petitioner

Appeals Printers
Boston, MA

QUESTIONS PRESENTED FOR REVIEW

The issue which this case raises is whether the filed rate doctrine mandates that a shipper must pay the full tariff rate to an insolvent carrier in a rate undercharge collection before the matter may be referred to the Interstate Commerce Commission for a determination of the reasonableness of those rates.

PARTIES TO THE PROCEEDING BELOW

Appellant in the court below was Langdon M. Cooper, the Trustee for the estate in bankruptcy of Carolina Motor Express, Inc., a motor common carrier regulated under the Interstate Commerce Act.

Appellee in the court below was California Consolidated Enterprises, Inc., a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

Appellee in the court below was Peter C. Reiter, a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

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The decision of the Court of Appeals was recommended for publication as In Re Carolina Motor Express, Inc. ____ F.2d ____, 1991 WL 227610 (4th Cir. Nov. 7, 1991).

The District Court decisions were not recommended for full text publication. They were printed as Cooper v. California Consolidated Enterprises, Inc., 1989 Federal Carriers Cases at 83,464 and Cooper v. Peter C. Reiter, 1989 Federal Carriers Cases at 83,465.

The decision of the bankruptcy court was published as Cooper v. California Consolidated Enterprises, 84 Bankr. 979 (Bankr. W.D.N.C. 1988).

DATE OF ENTRY OF JUDGMENT AND GROUNDS FOR THE COURT'S JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(10), Title 28 of the United States Code. The decision of the Court of Appeals was entered on November 7, 1991. No petitions for rehearing were filed.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation

> or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. Section 10762 (a)(1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may

prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

U.S.C. Section 10701(a) requires that:

> A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 10762(a)(1) of Title 49, and under the provisions of Title 11 of the United States Code. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was

invoked pursuant to Sections 1291 and 1294(1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case raises the issue of whether, prior to paying an undercharge, a shipper may assert a defense of rate unreasonableness against a carrier seeking to collect its tariff rate in a rate undercharge proceeding. In Maislin Industries, Inc. et al v. Primary Steel, Inc., 497 U.S. ____, 110 S.Ct. 2759, 111 L.Ed. 2d 94 (1990), the court permitted a shipper to raise the question of rate reasonableness with the Interstate Commerce Commission. The unreasonableness of the filed rates had previously been recognized by this Court as a defense against a carrier's collection of its filed tariff rate. See United States v. Western Pacific R.

Co., 352 U.S. 59, 75 n.18, 77 S.Ct. 161, 171 n. 18, 1 L.Ed. 2d 126 (1956) and Pennsylvania R. Co. v. United States, 363 U.S. 202, 203, 80 S.Ct. 1131, 1132, 4 L.Ed.2d 1165 (1960).

The Maislin decision did not speak to the question of whether the disputed rates had to be paid first. The Fourth Circuit in this case required that the shipper must first pay the rates and then pursue the issue rate reasonableness in the ICC. This decision is contrary to the decision in several other circuits, but in accord with the decision of the Fifth Circuit.

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE") is a broker of motor carrier transportation. It arranges transportation services of motor carriers operating

under the authority of the Interstate Commerce Act for the shipping public. It provides these services pursuant to a permit issued to it by the Interstate Commerce Commission. CCE tendered traffic to Carolina Motor Express for transportation in interstate commerce.

Petitioner Peter Reiter is similarly a broker of motor carrier transportation, licensed by the Interstate Commerce Commission to perform these services. Peter Reiter also tendered traffic to Carolina Motor Express for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing of a petition under Chapter 11 by Carolina Motor Express, Inc., a motor common carrier. This was later converted to a petition for relief

under Chapter 7 of the United States Bankruptcy Code. Langdon M. Cooper was appointed Trustee of the estate while the proceedings were still under Chapter 11. As a motor common carrier, Carolina Motor Express had a tariff on file with the Interstate Commerce Commission (hereinafter referred to as "ICC" or "Commission"). The tariff at issue here contained a provision, effective June 16, 1985, which provided that the carrier could collect a late payment charge of 1.25% per month on all freight bills which were not paid within 15 days of the delivery of that shipment. The tariff also contained a provision that the carrier was entitled to collect attorney's fees in an amount computed at 33% of the transportation and late payment charges, if it became necessary for the carrier to turn the account over to an attorney for collection.

Plaintiff, Mark & Associates, is a rate auditing company hired by the estate, pursuant to Court order, to audit the carrier's freight bills. Plaintiff, Mark, audited the freight bills for shipments transported for petitioners, inter alia. The audit for CCE's shipments revealed freight undercharges in the amount of $58,793.03. The audit for Peter Reiter revealed freight undercharges in the amount of $13,795.73. Debtor and Mark Associates brought these actions to collect these amounts.

ARGUMENT

REASONS WHY THIS WRIT SHOULD BE GRANTED

A. Allowing the Decision of the Fourth Circuit to Stand Creates a Conflict between the Rule Adopted by It and the Decisions of other Courts of Appeal following the Decision of this Court in Maislin

In its Supplemental Brief for the

Federal Respondents in Opposition, concerning the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in Rebel Motor Freight, Inc. v. Interstate Commerce Commission (infra) (October Term, 1991) (cert. denied), the Solicitor General summed up the positions of the Courts of Appeal which have addressed this issue.

> With the decision in Carolina Motor Express, there is now a conflict in the circuits that is unlikely to be resolved by further litigation in the lower courts. The First Circuit has held that referral to the ICC of a rate-unreasonableness defense is appropriate. Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101 (1990). The Fourth Circuit's decision in Carolina Motor Express is to the contrary. The Fifth Circuit, in dicta, has taken the same position as the Fourth Circuit. In re Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S.Ct. 3254 (1990). While the issue presented in this case is now squarely before the Fifth Circuit In Advance-United Expressways, Inc. v. Eastman Kodak Co., No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; March 12, 1991) appeal pending, No. 91-1320, and the ICC will urge that court to permit referral, even if the Fifth Circuit were to agree with the Commission and to allow referral of rate-unreasonableness claims, the conflict between the First and Fourth Circuits would persist.
>
> 3. In an appropriate case, we believe that this conflict should be resolved by this Court. This case however, does not present a proper vehicle for resolution of the issue. (p.3, Supplemental Brief, pages 1-6, attached as Appendix "A").

To expand on the Solicitor General's presentation, the First Circuit, in Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101, prior to the decision of this Court in Maislin, had found for the shipper on both the defenses of unreasonable rates and unreasonable practices. After the entry of the Maislin Decision, that court amended its decision to reverse the initial decision on the unreasonable

practices. Relying on the specific language in Maislin, cited above, the First Circuit upheld the decision as to the reasonableness of the rates defense. (Slip Opinion, Appendix "B")

The Second Circuit also allowed a shipper to raise the unreasonableness of the rates sought to be collected as a defense. See Duffy v. BMC Industries, Inc., 938 F.2d 353, 357 (2d Cir. 1991).

The Sixth Circuit in Rebel Motor Freight, Inc. v. I.C.C., U.S.A. and Sunshine Mills, 933 F.2d 1009 (6th Cir. 1991), cert. den. ____U.S.____, Dec. 2, 1991 and Orr v. I.C.C., 912 F.2d 119 (6th Cir., 1990) did not require the shipper to pay the full rates prior to a determination by the ICC as to the reasonableness of the rates, but the issue presented there was complicated

by a statute of limitations issue as explained in the Solicitor General's Supplemental Brief.

In Western Transportation Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir., 1982)(a pre-Maislin case) the Seventh Circuit allowed the shipper to pursue its rate unreasonableness argument before the ICC without first requiring the shipper to pay the tariff rate.

The Eighth Circuit has not spoken directly to this issue. However, on remand of the Maislin case, the district court did not require the payment of the tariff rate. Maislin Industries v. Primary Steel, 1991 WL 264536, *2 (W.D. Mo., Nov. 21, 1990).

In contrast to those decisions, the Fifth Circuit, in an unpublished decision, Advance-United Expressways,

Inc. v. Duro Metal Mfg. Co., No. 90-7086 (5th Cir. Aug. 23, 1991)(per curiam) followed the precedent set in Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388, 389 (1989)(a pre-Maislin decision). In that case, the Fifth Circuit found that the defense of unreasonable rates did not protect the shipper from having first to pay the filed rate and then file for reparations. That is the path the Fourth Circuit chose to follow in the instant case.

The Third Circuit has not directly addressed this issue. In Branch Motor Express Co. v. Caloric Corp., No. 89-1131 (3rd Cir., Aug. 14, 1990) that court would not allow the shipper to raise the issue of the unreasonableness of the carrier's rates as the shipper had not presented any evidence to the

court as to the unreasonableness of those rates.

B. This clear split between the Circuits must be resolved because of its importance to the Interstate Commerce Commission (Commission) in its administration of the Act.

Therefore, there is a clear split between the Circuits on this issue. Because of its importance to shippers and in the administration of the Interstate Commerce Act, the Solicitor General has indicated that this issue should be resolved by this Court in an appropriate case (Rebel Brief, supra). We submit that this is an appropriate case. Moreover, the urgency of obtaining a resolution of these issues is increasing as carriers seek to disavow their own previously filed discount rates as unlawful without referral to the Commission. The

Commission has estimated that this new development could increase the maximum potential exposure of shippers for undercharge claims from the up to $1 billion associated with the negotiated but unfiled rates addressed by this Court in Maislin to $27 billion. (Traffic World, "ICC makes 'conservative' estimate of undercharges - over $27 billion" December 16, 1991, p. 31; Traffic World, "The Week", December 2, 1991).

C. The Ruling Below Conflicts with Decisions of this Court.

In Maislin, supra, this Court unequivocally stated that the shipper in a negotiated rates case was entitled to explore the reasonableness of the rates sought to be collected, Maislin, supra 110 S.Ct. at 2767. This followed an earlier line of cases in which this

Court had allowed the shipper to assert the unreasonableness of the filed rates as a defense against the collection of that rate. See United States v. Western Pacific R. Co., 352 U.S. 59, 75 n. 18, 77 S.Ct. 161, 171 n. 18, 1 L.Ed. 2d 126 (1956) and Pennsylvania R. Co. v. United States, 363 U.S. 202, 203, 80 S.Ct. 1131, 1132, 4 L.Ed.2d 126 (1956). A necessary corollary to that right is that, if the rates were found to be unreasonable, that finding would operate as a defense to the payment of the charges. If this were not a corollary, the reasonableness of the rates would be a non-issue, because the shipper would be required to pay the tariff rate, whether it was reasonable or not. As the carrier, in that case as well as in the instant proceeding, was in bankruptcy, a finding that the rate was unreasonable would only be of any

effect if the shipper could assert it prior to paying the full tariff rate to the estate. As an unsecured creditor, the shipper could not reasonably expect any meaningful return from the estate in bankruptcy if the rate collected were subsequently determined to be unreasonable.

The Fourth Circuit has overlooked a significant condition for prepayment set forth in the Fifth Circuit's decision in Southern Pacific Transportation Co. v. City of San Antonio, 748 F.2d 266 (5th Cir. 1984), the cornerstone of Supreme Beef Processors v. Yaquinto (In re Caravan Refrigerated Cargo), 864 F.2d 388 (5th Cir. 1989), cert. den. 110 S.Ct. 3254 (1990). In City of San Antonio, the court held that the "carrier must be prepared to reimburse amounts later

found to be unreasonable." Id., at 274. As a result, we believe it is clear that the effectiveness of a subsequent reparations remedy is a pre-condition to requiring prepayment. Requiring a shipper to pay the amounts claimed to be due to a defunct carrier where there is little prospect that a subsequent order of reparations will provide any effective remedy because the auditor/collection agency retains approximately 70% of the amount collected off the top and the remaining 30% will be dissipated before a subsequent order becomes effective clearly produces a result proscribed by this Court's decisions in Western Pacific, supra, and General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940).

CONCLUSION

This Court in Maislin has reaffirmed the obligation of carriers to charge and shippers to pay the filed tariff rate. This Court also reaffirmed the requirement set forth in 49 U.S.C. Section 10701(a) and in United States v. Western Pacific R. Co., supra, that the rates must be reasonable, and that, if the rates are not reasonable that that unreasonableness would constitute a defense to the payment of the excessive rate. Because of the split which has come into existence between the Circuits on the issue of whether the shipper must pay the full tariff rate to an insolvent carrier prior to referral to the Commission, and the importance of a resolution of the issue to the Commission in its administration of the Interstate Commerce Act and the public interest, it has become

necessary for this Court to resolve this issue.

Petitioners, therefore, request this Court to grant this Petition for a Writ for Certiorari and that same be issued to the United States Court of Appeals for the Fourth Circuit to the end that its decision be reversed and held null, and that the court below be instructed to refer the question of the rates sought to be collected to the Interstate Commerce Commission, prior to payment being required.

Respectfully submitted,

Robert J. Gallagher
17 New South Street
Northampton, MA 01060
Counsel of Record for
Petitioners

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-3259, 89-3261, 89-3262

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

LANGDON M. COOPER, Trustee; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

DELAWARE VALLEY SHIPPERS, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

PETER C. REITER, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

CALIFORNIA CONSOLIDATED ENTERPRISES, INC., DEFENDANT-APPELLEE

Appeals from the United States District Court
for the Western District of North Carolina, at Shelby
Woodrow Wilson Jones, Senior District Judge
CA-88-147-SH-C, CA-88-138-SH-C, CA-88-139-SH-C

December 7, 1989, Argued

November 7, 1991, Decided

Before WIDENER and HALL, Circuit Judges, and MICHAEL, District Judge*

WIDENER, J.

In this consolidated appeal, we address issues arising from the requirement of the Interstate Commerce Act (Act), 49 U.S.C. § 10101 et seq. (1982) that motor common carriers file their rates with the Interstate Commerce Commission (ICC) and that both shippers and carriers adhere to these rates. These cases involve a motor carrier that seeks to collect, based upon its tariff on file with the ICC, undercharges from a shipper with whom it privately negotiated a rate lower than that which the tariff required.

The bankruptcy court entered a final judgment for the plaintiffs in two of the three cases, concluding that because the filed rate doctrine precluded defendants' assertion of equitable defenses to the carrier's undercharge claims, the carrier was entitled to recover regardless of its own actions. Cooper v. California Consolidated Enterprises, 84 Bankr. 979 (Bankr. W.D.N.C. 1988). On appeal, the district

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* United States District Judge for the Western District of Virginia, sitting by designation.

court reversed the final judgments of the bankruptcy court and referred to the ICC the question of whether the carrier's collection of the undercharges would amount to an unreasonable practice. Although the ICC has yet to issue a decision in the two cases, plaintiffs now appeal.[1]

On recommendation of the bankruptcy court, the district court withdrew reference to the bankruptcy court of the third case and, on the defendant's motion, referred the case to the ICC. The ICC later issued a decision in the case stating that the carrier's collection of undercharges constituted an unreasonable practice. Based upon the ICC's finding, the district court granted summary judgment for defendant and dismissed plaintiffs' action. Plaintiffs appeal.[2]

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[1] In their brief, defendants Reiter and California Consolidated Enterprises question the propriety of this court's jurisdiction by characterizing plaintiffs' appeal as the impermissible appeal of the district court's interlocutory order of referral to the ICC. Although this issue is not worthy of extensive discussion, we note that a significant difference exists between our more usual review of a district court sitting in judgment as a trial court and our review of a district court acting as an appellate tribunal in bankruptcy. This distinction has caused many circuit courts to adopt more relaxed definitions of a final district court order in bankruptcy if, as is the case here, a bankruptcy court already has entered a final order. See, e.g., Sambo's Restaurants, Inc. v. Wheeler, 754 F.2d 811, 813-15 (9th Cir. 1985); In re Marin Motor Oil, Inc., 689 F.2d 445, 449 (3d Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

[2] Defendant Delaware Valley Shippers also advances a jurisdictional argument. Delaware Valley contends that plaintiffs' appeal as to it should be dismissed because plaintiffs failed to seek review of the ICC's decision within the ninety-day period specified in 28 U.S.C. § 1336(c). The short answer to the argument is that plaintiff did not appeal from the ICC's decision, but from the district court's entry of summary judgment.

We vacate the district court's reversal of the bankruptcy court's judgment in the first two cases, and vacate the district court's entry of summary judgment for defendant in the third case. For the reasons discussed below, we remand these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated in 89-3261 and 89-3262, that the plaintiffs' cross-appeal from the judgment of the bankruptcy court concerning late payment charges and attorneys' fees be ruled upon in 89-3261 and 89-3262, and that judgment be entered in favor of the plaintiffs in 89-3259.

I.

Because the material facts in all three cases are undisputed and are for all practical purposes identical, we need not set forth a detailed chronology of the relationship between the parties. The Fifth Circuit aptly described the present scenario as follows:

> The well-worn choreography for these cases involves a motor carrier's action against a shipper to collect for under-charges; that is, to collect the difference between the higher rate which the carrier has filed with the Interstate Commerce Commission . . . and the rate which the parties had negotiated.

Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388, 388-89 (5th Cir. 1989), cert. denied, 58 U.S.L.W. 3818 (1990). As was the case in Supreme Beef, the motor carrier in this case, Carolina Motor Express (CMX), supplied transportation services to the shippers at privately negotiated rates. The shippers believed that CMX would publish the quoted rates in its tariff on file with the ICC. CMX however, did not publish the quoted rates as a tariff

and later billed the shippers at the negotiated rate, which the shippers paid in full. After CMX became bankrupt, an independent auditor employed by the bankruptcy trustee discovered the discrepancy between the collected rates and the applicable tariff rates. The trustee and auditor then filed suit to recover the difference on behalf of CMX as debtor.

II.

Under 49 U.S.C. § 10761(a), a motor carrier subject to the Interstate Commerce Act "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff" filed with the ICC. In addition, the Act states that "[a] rate . . . , classification, rule, or practice related to transportation or service provided by a carrier . . . must be reasonable." 49 U.S.C. § 10701(a). In the classic case of Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), the Court explained the significance of section 10761(a)'s predecessor which is the same for the present statute:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

The Court recently reemphasized the importance of this filed rate doctrine as "essential to preventing price discrimination and stabilizing rates." Maislin Industries, U.S., Inc v. Primary Steel, 58 U.S.L.W.

4862, 4864 (1990). The defendants, prior to our order holding this appeal in abeyance pending the Supreme Court's Maislin decision, contended that the carrier's attempt to collect the undercharges was an unreasonable practice under the Act and that the plaintiffs were therefore not entitled to collect the filed rate. Maislin rejected just this contention as do we. As the Supreme Court observed, allowing such an equitable defense would be "flatly inconsistent" with the statute because the defense "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." Maislin, 58 U.S.L.W. at 4865-66. We accordingly vacate the district court's reversal of the bankruptcy court's judgment in 89-3261 and 89-3262, and vacate the district court's entry of summary judgment for defendant in 89-3259.

The defendants next argue that, Maislin notwithstanding, this court should remand these cases back to the district court with instructions to refer them to the ICC for a determination of the reasonableness of the carrier's filed tariff rates. In fact, the defendants argue that certain passages in the Maislin opinion require such an course. Before we consider this argument, however, we must first address the plaintiffs' assertion that the defendants have waived any claim they may have had by failing to raise the issue of rate reasonableness in prior proceedings. After a review of the record in these cases, we find that the defendants have preserved the argument.

Having determined that the defendants may contest the reasonableness of the carrier's filed rates, the question remains of whether the cases should be remanded for re-referral to the ICC. This question

is one that the Supreme Court has not decided and on which there is no precedent in this circuit. Maislin, to be sure, did mention in a footnote that the issue of rate reasonableness was not presented in the case and would be "open for exploration" on remand. 58 U.S.L.W. at 4865 n.10. But while the Supreme Court has noted without disapproval a stay of proceedings and referral to the ICC after reasonableness was raised as a defense, see Maislin, 58 U.S.L.W. at 4864; United States v. Western Pac. R.R. Co., 352 U.S. 59, 71 (1956), it has also reiterated in Maislin that "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." 58 U.S.L.W. at 4865 (quoting Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. 370, 384-85 (1932); see also Pennsylvania R.R. Co. v. International Coal Mining, 230 U.S. 184, 197 (1913) ("If . . . the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation."). We believe that the Court's decisions are correctly read as taking no position on whether re-referral to the ICC is required in such cases.

We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier. We believe that such an approach is preferable to an alternative procedure under which the courts would automatically refer cases to the ICC whenever a rate was challenged. This alternative approach would provide a strong incentive for shippers routinely to con-

test the validity of the carriers' rates in order to delay paying the carrier's filed rate. Such a situation would be wholly inconsistent with the filed rate doctrine. Shippers are charged with knowledge of the filed rate, Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. at 97; Kansas City Southern R.R. Co. v. Carl, 227 U.S. 639, 653 (1913), and can contest its reasonableness directly before the ICC at any time, see 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986). Moreover, carriers are entitled to receive the filed rate for their services immediately when due. Arizona Grocery v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. at 384; Southern Pac. Transp. Co. v. San Antonio, Texas, 748 F.2d 266, 274 (5th Cir. 1984). Given these basic precepts, we believe that it would be anomalous to allow the defendants a further delay in paying the rates, of which they have been charged with knowledge from the beginning, but which they did not contest until they were sued by the trustee.

In adopting this position, we join the Fifth Circuit, which has determined that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d at 392; see also Southern Pacific Transp. Co. v. San Antonio, Texas, 748 F.2d at 274. We note that such a rule in no way forecloses the shipper from raising the issue of the reasonableness of the tariff rates. This issue could be raised either before or after the filing of the undercharge suit and could result in a reparations payment to the shipper by the carrier. See 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference, 793 F.2d at

379. In the meantime, however, the tariff rate as filed will have been enforced. While we recognize that judicial opinion on this point is not unanimous, Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990); see also Western Transp. Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982), we believe that the rule we adopt today best accords with the Supreme Court's longstanding insistence that "strict adherence to the filed rate . . . , despite its harsh consequences in some cases, is necessary to enforcement of the Act." Maislin, 58 U.S.L.W. at 4866; see Southern Pac. Co. v. Commercial Metals, 456 U.S. 336, 343-44 (1982); Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 361 (1943). And we add that we consider it of considerable importance that the filed rate doctrine has resulted in the prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in times past.

On remand, the district court is instructed to reinstate the judgment of the bankruptcy court in 89-3261 and 89-3262, and to enter judgment for the plaintiffs in 89-3259. In addition, the district court in 89-3261 and 89-3262 should rule upon the plaintiffs' claim that the bankruptcy court erred in denying the late payment charges and attorneys' fees provided for in ICC CAXN 101 Item 435 of the carrier's tariff.[3]

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[3] If the district court finds that the language of this tariff provision applies to any of the charges at issue in these cases, the parties are bound by the tariff's terms. An unambiguous and duly published tariff is "binding on the parties and has the force of law . . . . regardless of the intentions of the parties or the equities existing between carrier and shipper." Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1372 (9th Cir. 1985); see also National Van Lines, Inc. v. United States, 355 F.2d 326, 331 (7th Cir. 1966).

Accordingly, the judgments of the district court reversing the bankruptcy court in 89-3261 and 89-3262 are

VACATED AND REMANDED WITH INSTRUCTIONS.

The district court's entry of summary judgment in 89-3259 is also

VACATED AND REMANDED WITH INSTRUCTIONS.[4]

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[4] The dissent argues that when, as in this case, the carrier is in bankruptcy, our decision today "may well leave the complaining shipper without a remedy" because "an independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable because the assets of the debtor's estate had been distributed earlier." Dissent, p. [15a], n.3. We disagree. Under the Bankruptcy Code as it now stands, the shipper who is required by our ruling today to pay the full tariff rate, and who then argues that this rate is unreasonably high, would stand in the same position as a shipper who had complied with the law by paying the full tariff rate in the first instance. The Bankruptcy Code defines a claim to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed [or] undisputed." 11 U.S.C. § 101(5)(A). "By this broadest possible definition . . . [the Code] contemplates that all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case." H. Rep. No. 595, 95th Cong. 1st Sess. 309 (1977), S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787. The right to reparation for payments under an unreasonably high tariff rate, see 49 U.S.C. §§ 11705(b)(3), 10701(a), would constitute a pre-petition contingent, unliquidated, and disputed claim against the bankruptcy estate. See Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988), cert. dismissed, 109 S.Ct. 201, 101 L.Ed.2d 972. As a general unsecured creditor, the complaining shipper would have the right to be paid a pro rata share of his claim along with the carrier's other unsecured creditors. 11 U.S.C. § 726(a)(2), (b). If waiting for an ICC determination of unreasonableness would "unduly delay" distribution of the bankruptcy estate, the value of the shipper's reparations claim would be estimated in the bankruptcy proceeding. 11 U.S.C. § 502(c)(1) ("There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.") In sum, the dissent's concern for the shipper who must deal with a bankrupt carrier is unfounded. The Bankruptcy Code provides adequate relief.

In the response to this note, at note 3, the dissent asserts that "there is no question" that in "an undercharge action by a non-bankrupt carrier" the shipper would be entitled to assert an unreasonable rate defense. Therefore, it argues, the shipper also should be allowed to assert the defense when the claim is brought by the trustee for a bankrupt carrier. Contrary to this assertion, however, there not only is a question whether a shipper can assert the unreasonable rate defense in an undercharge action by a non-bankrupt carrier, this is the very question that we address in our opinion today. To reiterate: "We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." Majority opinion at [7a]. It is apparent, once we get beneath the bankruptcy veneer, that the dissent simply disagrees with the majority holding in this case.

HALL, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's application of Maislin to the cases before us to the extent that the shippers' defense of "unreasonable practice" is disallowed as violative of the filed-rate doctrine. I disagree, how-

ever, with the majority's holding that a shipper may not raise "unreasonable rate" as a defense in an undercharge action. Furthermore, I believe that the equitable defense of unreasonable rate implicates a matter within the primary jurisdiction of ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action.

Maislin involved a fact pattern similar to the instant cases. A carrier filed for bankruptcy, an audit revealed that several shippers had paid negotiated rates rather than the filed rate, an undercharge action was instituted, and the defendant shippers raised both unreasonable-rate and unreasonable-practice defenses. The primary thrust of the Supreme Court's decision is to invalidate ICC's 1986 Negotiated Rates policy and thereby affirm the continued validity of the filed-rate doctrine. The Court noted, however, that the "filed rate is not enforceable if ICC finds the rate to be unreasonable." *Id.*, 110 S. Ct. at 2767. Although both the reasonableness of the rates and the practice of charging a negotiated rate were referred to ICC by the district court in Maislin, only the unreasonable practice issue was addressed by the agency. Maislin Industries, U.S. v. Primary Steel, 705 F. Supp. 1401, 1402-03 (W.D. Mo. 1988). The Supreme Court noted, without elaboration, that "the issue of the reasonableness of the tariff rates is open for exploration on remand." Maislin, 110 S. Ct. at 2767 n.10. This somewhat cryptic footnote "has created uncertainty as to whether, in a carrier's suit to collect undercharges, a shipper may assert as a defense that the applicable tariff rate is unreasonable and obtain a stay of the suit and a reference to ICC for a determination of whether the rate is unreasonable." Duffy v. BMC Industries,

Inc., 938 F.2d 353, 355 (2nd Cir. 1991). This uncertainty leads the majority to a decision that I believe is at odds with precedent and sound practice.[1]

The majority finds, and I agree, that the three appellant-shippers have preserved the issue of rate reasonableness. The question remaining after Maislin is whether the shippers should be allowed to dispute the reasonableness of the rates in the context of the undercharge action, or whether their sole recourse should be an independent reparations[2] action under 49 U.S.C. § 11705(b)(3). For a variety of reasons, I believe the former path is correct.

I believe the sounder position is set forth in Delta Traffic Service v. Transtop, Inc., 902 F.2d 101, 104-07 (1st Cir. 1990). In addition to demolishing the legal basis for the non-referral rule adopted by the Fifth Circuit in Supreme Beef Processors, the First Circuit explains the historical basis for the referral and stay rule which it believed was "universally accepted" until Supreme Beef Processors was discovered. Id. at 105. To the First Circuit's analysis I can only add the names of other post-Maislin decisions that have followed the referral and stay rule. Duffy v. BMC Industries, 938 F.2d 353 (2nd Cir. 1991); Horn's Motor Express v. Harrisburg Paper Co., 765 F. Supp. 211 (M.D. Pa. 1991); Overland Express v. International Multifoods, 765 F. Supp. 1386 (S.D. Ind. 1990); Oneida Motor Freight v. Ormond Shops, 126 Bankr. 431 (D.N.J. 1991); In re

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[1] Upon remand, the district court in Maislin did stay proceedings and referred the rate issue to the ICC. Maislin Industries, U.S. v. Primary Steel, 1990 WL 264536 (W.D. Mo. Nov. 21, 1990) (unpublished).

[2] The term "reparations" was changed to "damages" in 1978. Pub. L. 95-473, 92 Stat. 1451 (1978).

Sharm Express, Inc., 122 Bankr. 999 (D. Minn. 1991).

One of the majority's arguments against referral and stay is that such a procedure "would provide a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate." Slip op. at 7[a]. This argument ignores the disincentives against the filing of frivolous pleadings, e.g., Fed. R. Civ. P. 11, as well as other provisions to discourage delaying tactics. See, e.g., 49 U.S.C. 11705(d)(3) (allowing an award of attorney's fees to a prevailing party in an action to enforce an ICC order for damages). Moreover, a complaining shipper should be required to present a threshold level of evidence of unreasonableness before referral is warranted; "a bold, conclusory allegation of rate unreasonableness" is insufficient. Oneida Motor Freight, 126 Bankr. at 442; see also In re Sharm Express, 122 Bankr. at 1004-05 (fifty percent disparity between rates of the carrier claiming undercharges and other ICC carriers sufficient to warrant referral); Covey v. Conagra, 763 F. Supp. 479, 482 (D. Colo. 1991) (party requesting reference must "make a threshold showing of unreasonableness . . . ."). This threshold determination would act as a further check against the referral of non-meritorious claims of rate unreasonableness.

These undercharge cases often arise in bankruptcy proceedings. Allowing the bankruptcy to proceed unabated, despite a claim of rate unreasonableness, may well leave the complaining shipper without a remedy. An independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable because the assets of the debtor's estate had been distributed earlier.[3]

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[3] The majority establishes the following procedure for cases of this kind: (1) the shipper first pays to the bankruptcy trustee the difference between the negotiated rates paid and the filed rate; (2) the shipper's assertion of an unreasonable rate is treated as an unsecured claim against the bankruptcy estate; (3) the bankruptcy court estimates the value of this claim by determining the reasonable rate; and (4) the shipper receives, along with other unsecured creditors, a pro rata share of his claim. Slip op. at 9, n.4. Presumably, the independent reparations action before the ICC continues apace. See Slip op. at 7. Should the ICC eventually determine that the filed rate was not reasonable (and, therefore "not enforceable," Maislin, 110 S. Ct., at 2767), it is not clear what the shipper's remedy is at that point. Even if the bankruptcy action is still pending, the only effect would be to substitute the ICC's determination for the bankruptcy court's estimate of the claim's value.

I believe this stands the matter on its head. It is the bankruptcy trustee who is making a claim against the shipper; the shipper, in turn, has asserted the defense of "unreasonable rate." If the shipper is correct, the filed rate is "not enforceable," id., and the trustee should receive nothing more than the unpaid portion of the reasonable rate. The majority, however, would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate. After this rate is paid, the shipper is left with a claim against the estate; even if the court estimates the value of this claim as the full difference between the negotiated rate and the filed rate, the shipper can only receive a pro rata share with the other unsecured creditors, an amount likely to be substantially less than the "claim" itself.

As the majority correctly notes, this procedure puts these shippers in the same position as those that had paid the filed rate initially. The majority ignores the fact that in the cases involving negotiated rates, the shippers are asserting a defense. See Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101, 104 (1st Cir. 1990) ("Because shippers may assert the unreasonableness of a rate as grounds for recovery in a

I would reverse in 89-3259 and affirm the district court's order in 89-3261 and 89-3262 to the extent the bankruptcy court's orders in these cases were reversed, and I would remand with instructions to refer the rate unreasonableness issue to ICC and to stay other proceedings pending ICC's determination. I would, however, condition the referral upon a showing by each shipper that its rate claim was more than a "bold, conclusory allegation of rate unreasonableness." Oneida Motor Freight, 126 Bankr., at 442.

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reparations suit, courts ordinarily have permitted shippers to assert this same ground as a defense in a carrier's suit to collect the filed ('legal') rate.") (citing United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956), and other cases). In an undercharge action by a non-bankrupt carrier, there is no question that the shipper would be entitled to assert this defense. In an undercharge action brought as an adversary proceeding by a bankruptcy trustee, I see no reason why the defense should be disallowed. See Bankruptcy Rule 7008. That this places the negotiated-rate shippers in a somewhat better position than the filed-rate payors is not a basis for eliminating the defense of rate unreasonableness. See Delta Traffic Service, Inc. v. Georgia-Pacific Corp., 936 F.2d 64 (2nd Cir. 1991) (ordering district court to separately maintain the amount paid by the shipper as the difference between the negotiated and filed rates until rate reasonableness issue resolved by ICC).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-329

REBEL MOTOR FREIGHT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This supplemental brief is filed pursuant to Rule 15.7 of the Rules of this Court to call attention to a recent decision of the United States Court of Appeals for the Fourth Circuit in *In re Carolina Motor Express, Inc.*, Nos. 89-3259 89-3261, 89-3262 (Nov. 7, 1991).[1]

1. The principal issue in this case is whether, under the filed rate doctrine, when an insolvent motor carrier sues to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission (ICC) of the reasonableness of that rate. The court of appeals in this case correctly held that

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[1] The opinion of the court of appeals in *Carolina Motor Express* is reproduced in an appendix to this brief. App., *infra*, 1a-16a.

the shipper's unreasonable-rate defense should be referred to the ICC.

In *In re Carolina Motor Express, Inc., supra*, a divided panel of the Fourth Circuit reached the opposite conclusion, holding that referral is not permitted. There, a motor carrier had provided transportation to shippers at unfiled, negotiated rates. After the carrier's bankruptcy, an auditor discovered that the applicable tariff rates were higher than the negotiated rates. The trustee and the auditor then sued the shippers to recover the difference. App., *infra*, 4a-5a. The court of appeals held that the shippers' defense that the tariff rates were unreasonable did not justify a stay of enforcement pending referral to the ICC. *Id.* at 7a. The majority reasoned that such a procedure would be "wholly inconsistent with the filed rate doctrine," which requires that "shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." *Ibid.* Judge Hall dissented from that ruling. *Id.* at 11a-16a. He would have held that the shipper's defense that the rate is unreasonable "implicates a matter within the primary jurisdiction of [the] ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action." *Id.* at 12a.

2. In our brief in opposition, we noted that, although the courts of appeals had reached different conclusions as to the appropriateness of referring claims of unreasonableness to the ICC, there was no conflict between published decisions of the courts of appeals that had squarely addressed this issue. Accordingly, we suggested that this Court's intervention was not currently required. Br. in Opp. 13-14.

With the decision in *Carolina Motor Express*, there is now a conflict in the circuits that is unlikely to be

resolved by further litigation in the lower courts. The First Circuit has held that referral to the ICC of a rate-unreasonableness defense is appropriate. *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101 (1990). The Fourth Circuit's decision in *Carolina Motor Express* is to the contrary. The Fifth Circuit, in dicta, has taken the same position as the Fourth Circuit. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990). While the issue presented in this case is now squarely before the Fifth Circuit in *Advance-United Expressways, Inc.* v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320, and the ICC will urge that court to permit referral, even if the Fifth Circuit were to agree with the Commission and to allow referral of rate-unreasonableness claims, the conflict between the First and the Fourth Circuits would persist.

3. In an appropriate case, we believe that this conflict should be resolved by this Court. This case, however, does not present a proper vehicle for resolution of the issue.

As this Court is aware, see *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), in recent years a significant number of motor carriers have become insolvent and have sought to collect undercharges from shippers who had relied on negotiated, unfiled rates. The total amount at stake in those cases has not been determined, but "[i]t now is estimated that freight undercharges are approaching $1 billion in liability."[3] "[M]any ship-

[3] J. Schulz, "Charging Discount 'Schemes' Illegal, Transcon Seeks Huge Shipper Refunds," *Traffic World* 15 (Nov. 11, 1991). On September 19, 1991, the Chairman of the ICC advised the Senate Committee on Commerce, Science, and Transportation that published estimates of undercharge liability

pers have challenged the reasonableness of the rate sought by bankrupt motor carriers and their collection agents in undercharge actions." *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 62 (1991). The Commission has advised us that, at present, nearly 200 rate-unreasonableness cases are pending before it related to undercharge claims and that those cases involve an estimated $10 million. The current controversy over the meaning of the filed rate doctrine, therefore, has significant financial implications for the shipper community and motor carrier industry.[3]

The issue is also important to the ICC's administration of the Interstate Commerce Act. In the wake of this Court's decision in *Maislin*, courts have experienced difficulty in reconciling the filed rate doctrine with the demands of the primary jurisdiction doctrine. Where courts have refused to refer rate-unreasonableness claims to the ICC, the ICC's pri-

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range from $200 million to as much as $1 billion. The ICC is aware of at least 186 motor carriers that have filed claims against shippers based on the existence of higher tariff rates than the rates that were negotiated.

[3] To be sure, it is uncertain whether shippers and carriers will continue to face this problem with respect to future shipments. As this Court noted in *Maislin*, "[o]ne would think that a shipper who has the market power to require a carrier to reduce his tariffs could also require proof from a carrier that the negotiated rate had been filed before tendering the shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate schedule." 110 S. Ct. at 2769 n.12. With proof of the filed rate in hand, the shipper could presumably avoid the situation where a bankrupt carrier, years after the shipment, would assert the right to collect a higher-than-agreed-upon filed rate, which the shipper believes is unreasonable. Nevertheless, the existing backlog of cases is of a sufficient magnitude to cause concern to the transportation industry.

mary jurisdiction to enforce the Act is undermined, and shippers are deprived of an adequate remedy. The confusion over proper application of the primary jurisdiction doctrine will continue absent clarification by this Court.[4]

Nevertheless, we do not believe that this case is an appropriate vehicle for review of this issue. The judgment in this case is supported by a ground on which there is no conflict in the circuits and which does not warrant this Court's review: referral to the ICC is permitted here because petitioner did not commence its undercharge action until after the statute of limitations had run on the shipper's right to seek reparations. As we explain in our brief in opposition (at 11-12), it is settled law that referral to the ICC is authorized in that setting under this Court's decision in *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956). The Second Circuit so held in *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 357 (1991), and no court of appeals has disagreed.

The existence of this narrower ground for decision obviates the need for reaching the broader question raised by the petition in this case. Cf. *Duffy*, 938 F.2d at 358 ("It will be time enough to revisit the issue [of whether a rate-unreasonableness claim should, in general, be referred to the ICC] * * * when a shipper who has not paid asserts an unreas-

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[4] The confusion may also spread to other issues. For example, the ICC advises us that some trustees of bankrupt carriers are now claiming that their own filed discount tariffs are unlawful and that they are therefore entitled to collect higher rates based on their non-discount tariffs. These trustees are also claiming, in reliance on the filed rate doctrine and *Maislin*, that courts are barred from referring to the ICC the issue of whether their discount tariffs are consistent with the Act. This argument, if accepted, would significantly expand the financial exposure of shippers while impeding the Commission's ability to interpret and apply the Act.

onable rate defense to a suit by a carrier who has promptly billed for the freight alleged to be owing."). Because the issue on which the circuits are divided is being widely litigated, this Court will have another opportunity to address the question in a case that properly presents it. Review of the court of appeals' unpublished decision in this case is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Senior Associate General Counsel

JUDITH A. ALBERT
Attorney
Interstate Commerce Commission

NOVEMBER 1991

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[6] We note that our brief in opposition was in error in indicating that petitioner is in bankruptcy proceedings. See Br. in Opp. 5, 7, 8 n.4. Petitioner has liquidated its operations, Pet. App. 2a, 9a, and is no longer an operating motor carrier. Although petitioner has not filed for bankruptcy, the more characteristic situation in which insolvent motor carriers have sued for undercharges does involve bankruptcy proceedings, see, *e.g.*, *Maislin*, 110 S. Ct. at 2764, and at least one court of appeals took bankruptcy procedures into account in denying referral. See *Carolina Motor Express*, App., *infra*, 10a-11a n.4. This Court may wish to await a case involving a bankrupt carrier seeking to collect undercharges in order to consider the interaction of the bankruptcy laws and the primary jurisdiction doctrine.

Carolina Motor Express, Inc., 1. D. No. 56-1299892

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., Plaintiffs v. California Consolidated Enterprises, Inc., Defendant, SH-C-88-139.

United States District Court for the Western District of North Carolina, April 25, 1989.

Recovery of additional charges-Statutory duty of Commission-Primary Jurisdiction. --In a proceeding in which a carrier sought to recover additional charges from a shipper for the transportation of certain freight, a federal district court concluded that the lower court erred in denying the shipper's motion to refer the action to

the Interstate Commerce Commission for consideration of whether or not it would be an unreasonable practice for the shipper to make payments. The Commission has the statutory duty to determine whether a practice being conducted by a common carrier is reasonable and, therefore, invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was unreasonable to if for an advisory opinion, the court said. The court pointed out that continued adherence to the filed-rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. The court agreed with the shipper's arguments that the issues raised in this case were within the primary jurisdiction of the ICC.

Back references.- Section 192.43; 247.75; 260.05.

Woodrow W. Jones, United States District The Defendant answered alleging that Judge: This Cause is before the Court upon an appeal by the Defendant, and a cross- authority by the Plaintiffs under the provisions of 28 U.S.C.A. Section 158(a) from a final judgment of the Bankruptcy Judge after a trial upon stipulated facts as to which there was no dispute.

The Plaintiffs, Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., brought this action in the United States Bankruptcy Court for the Western District of North Carolina against the Defendant, California

Consolidated Enterprises, seeking to recover alleged undercharges and pas@ due accounts receivables based upon motor carrier tariffs on file with the Interstate Commerce Commission.

The Defendant answered alleging that Carolina Motor Express had contract carrier authority and that the freight involved in this controversy was transported under a negotiated rate contract and that those rates were paid. It further alleged that the rates sought to be applied here by the Trustee in Bankruptcy are unreasonable and unlawful and that the efforts of the Plaintiffs to apply higher rates and charges than those agreed upon between the parties constitutes an unreasonable, unlawful, unfair and deceptive practice by the carrier in violation of 49 U.S.C.A.

Section 10701.

The Defendant moved to refer the matter to the Interstate Commerce Commission under the doctrine of primary jurisdiction but the Bankruptcy Judge denied the motion. The case went to trial on a stipulation of facts and the Bankruptcy Judge found that the defense of contract carriage was non-existent and reliance by the Defendant on the negotiated rate was not reasonable. The Court further found that even if it h:d been found to be reasonable that the "filed rate" doctrine is still the law of the land and that the Plaintiffs should recover judgment against the Defendant in the sum of $58,793.03 on the undercharge claim :ind $4,804.55 on the accounts receivable claim.

The Court denied attorneys fees and interest on the undercharge claim but applied them to the accounts receivable claim.

The Defendant appealed from the judgment of the Bankruptcy Court and the Plaintiffs appealed from the Court's denial of its claim for attorneys fees and interest on the undercharge claim. At the hearing before this Court on April 7, 1989 the parties advised the Court that the accounts receivable claim had been settled and was no longer an issue in this cause.

There is no dispute as to the facts of this case. At the trial in Bankruptcy Court the parties stipulated to the following essential facts:

The Plaintiff, Langdon M. Cooper is the duly appointed and acting Trustee of Carolina Motor Express, Inc., appointed by the Court upon the f:ling of a petition under Chapter 11, later converted to a petition for relief under Chapter 7, of the United States Bankruptcy Code and the other Plaintiff, Mark & Associates was hired by the Debtor pursuant to a contract approved by the Court, to audit the Debtor's freight bills. The Debtor operated at all times under consideration in these proceedings as a motor carrier transporting freight in interstate commerce pursuant to both contract and common carriage authority by the Interstate Commerce Commission. The Debtor filed a tariff provision with the ICC, effective June 16, 1985, which provides that a late payment charge of 1.25% per month be applied to all freight

bills which are not paid within (15) days of delivery of the underlying freight and that when payment is not made within (30) days and it becomes necessary to refer the matter to an attorney for collection, the Debtor is entitled to reimbursement of reasonable attorneys fees computed at 33% of the transportation and the late payment charges.

The Defendant, California Consolidated Enterprises, Inc., is a California Corporation and holds authority issued by the ICC to operate as a broker of transportation and is subject to ICC regulations codified at 49 C. F. R. 1045. The Defendant tendered freight to the Debtor for transportation in interstate commerce which was transported by Debtor pursuant to its authority from the ICC. The Plaintiff Mark audited all

of the freight bills by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC and
which was in effect on the date of each shipment handled for the Defendant. The results of said audit showed a balance due
of $58,793.03 which represents the balance due and owing to the Debtor by the Defendant for transportation charges rated pursuant to the lowest applicable common carrier tariff after all credits had been issued to the Defendant for previous payments made to the Debtor.

The Defendant was aware at all times involved in this proceeding that the Debtor, when transporting freight as a

common
carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. the Debtor's employees or agents, as an inducement to secure the Defendant's business, orally quoted to the Defendant certain freight rates and charges for the transportation of specified commodities between named origin and destination points. The quoted freight rates and charges were discussed by the Defendant and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by the Defendant. During those negotiations the Debtor's employees or agents represented to the Defendant that the quoted rates and charges would

cover the period that the
shipments moved. The Defendant believed that the Debtor would publish the quoted freight rates in its tariff filed with the ICC. The Defendant requested the Debtor to furnish it a copy of its tariff, but it was never produced. The Debtor's original freight bills for the shipments confirmed the negotiated freight rates and charges and confirmed the Defendant's belief that the Debtor had published the negotiated rates and charges in appropriate tariffs, filed properly with the ICC. The Defendant was billed for the shipments at the negotiated rates, and the Defendant has now paid all of such charges.

After the Defendant had made payment of the original transportation charges, the Plaintiffs billed the Defendant at a

higher rate for the same shipments, alleging that the higher rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period when the shipments moved and confirmed that the negotiated rates were never published by the Debtor in tariffs filed with the ICC. Based upon the negotiated rates and charges agreed upon by the parties the Defendant relied upon the representation of the employees and agents of the Debtor and utilized the Debtor's services, instead of other available motor carriers. Although the Defendant believed it had a contract with the Debtor, a written, bilateral contract, imposing specific obligations upon both the Defendant and the Debtor, and covering the shipments, was never executed by the Defendant and the Debtor.

The Plaintiffs rely upon the provisions of 49 U. S. C. A. Section 10761 (a) and the various court decisions construing the section for their support of the claims in this cause. The pertinent part of Section 10761(a) is as follows:

> That a carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Court interpretation of this statute has created the "filed rate" doctrine which is simply a rule of law that requires carriers subject to the Interstate Commerce Act to collect and for their shippers to pay, all lawful charges set forth in the applicable tariffs. Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94, 97, 35 S. Ct. 494, 495, 59 L. Ed. 853 (1915). This case holds that the rate of the carrier duly filed is the only lawful charge and deviation from it is not permitted upon any pretext. The purpose of the "filed rate" doctrine is to prevent carriers from giving by secret agreements discriminatory preferences to large volume shippers. See Armour Packing Co. v. United States, 209 U.S. 56, 81, 28 S. Ct. 428, 435, 52 L. Ed. 681 (1908). Generally, these cases hold that

affirmative defenses are not available to a carrier's claim for undercharges.

The Defendant says and contends that this case should not be determined by the "filed rate" doctrine but instead that Plaintiffs' claim should be referred to the Interstate Commerce Commission for a determination of whether the carrier's attempt to collect undercharges in this case constitutes an unreasonable practice. This contention is based upon the provisions of 49 U. S. C. A. Section 10701(a) which provides that "a rate (other than a rail rate), classification rule, or practice related to transportation or services provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable" (emphasis added) The

Defendant contends that the Commission has "primary jurisdiction" to determine whether the practice in this case is reasonable. "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pacific Railroad Co., 352 U. S. 59, 63-64, 77 S. Ct. 161, 164-165, 1 L. Ed. 2d 126 (1956).

The Defendant relies upon the statute, a recent court decision, Seaboard System Railroad, Inc. v. United

States, 794 F. 2d 635 (11th Cir. 1986) and an ICC policy statement to support its motion to refer this matter to the ICC. The Defendant contends that if the Commission found that Plaintiffs' attempt to collect the undercharges the facts of this case is an unreasonable practice such decision would provide the basis for a defense of equitable estoppel to the Plaintiffs' claim in this Court. In Seaboard, the court reviewed and affirmed an ICC determination that a carrier was barred from collecting undercharges. The Court noted that the Commission had departed from its prior decisions regarding the "filed rate" doctrine but approved such action because the changed policy was in keeping with the Commission's statutory mission as set forth in the Act. Id. at 639. In 1986 the Commission adopted a policy statement

which provides among other things:

> "In light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses. . . [and] if a case is referred to the [ICC, it] will decide if the collection of the undercharges would be an unreasonable practice." In reaching this conclusion the ICC discussed and defended its policy statement. It admitted that it did not have the authority to abrogate Section 10761 and therefore could not order the waiver of undercharges since the United States District Courts are the only bodies that can hear

> undercharge cases. Nevertheless, the Commission defended on several grounds its authority to consider all the circumstances surrounding an undercharge action brought in district court.

First, the Commission cited Seaboard, supra, as authority for the proposition that Section 10701(a) gives it the authority to consider whether a particular undercharge suit is an unreasonable practice.

Second, the Commission asserted that in particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim of undercharges. That the filed rate doctrine was not intended to condone or

reward carriers where such carrier's action may constitute fraudulent business practices.

Third, the Commission recognized that a new regulatory environment may have been produced by the Motor Carrier Act of 1980 and that, therefore, a fresh look was required in order to formulate the "proper regulatory response to the matter of unfiled negotiated motor carrier rates."

The Commission stated that the Motor Carrier Act of 1980 dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating

authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice. . . Hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement whether the agreed rate is actually on file. (Ex Parte No. MC-177, Oct. 29, 1986.)

The Commission has the statutory duty to determine whether a practice being conducted by a common carrier is reasonable and therefore invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was unreasonable to it for an advisory opinion. Some courts

have decided to take advantage of the expertise of the Commission in this field and stayed the proceeding while the issue was presented for review. Others have refused including the Bankruptcy Judge in this case. Briefly stated the Bankruptcy Judge determined that the "defense of contract carriage is nonexistent and reliance by the Defendant on the negotiated rate was not reasonable, and even if it had been Found to be reasonable that the `filed rate' doctrine is still the law of the land..." The Bankruptcy Court also denied the Defendant's motion to refer the matter to the ICC on the grounds that such referral would be improper and would result in an unnecessary delay of the proceedings.

This Court finds and concludes that the Bankruptcy Judge erred as a matter of

law in failing and refusing to refer to the ICC the issue of whether under the facts of this case it would be an unreasonable practice for the shipper to be required to pay the undercharge claim. This Court will therefore enter a judgment reversing the judgment of the Bankruptcy Court and ordering the issue referred to the Interstate Commerce Commission.

The facts in this case are basically undisputed. Carolina provided regulated transportation of goods in interstate commerce to the Defendant and the rate charged, billed and paid was less than the filed rate. Title 49 U. S. C. A. Section 10762(a)(1) of the Interstate Commerce Act, requires all motor common carriers to publish and file a tariff containing their rates for transporting

freight. This rate becomes the legal rate and the carrier is obligated to charge and collect that rate.

Historically there have been no exceptions to this rule, known as the "filed rate doctrine." The Supreme Court stated almost seventy-five years ago that, "ignorance or misquotation is not an excuse for either paying or charging less or more than the rate filed." Louisville & Nashville Railroad Co v. Maxwell, supra; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 40 S. Ct. 27 (1919). Thus, in the past, shippers have been precluded from raising equitable defenses in undercharge actions by common carriers under the filed rate doctrine. See, e.g., Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F. 2d 1360 (D.C. Cir.

1980) and Nyad Motor Freight, Inc. v. W. T. Grant Co., 486 F.2d 1112 (2nd Cir. 1973).

The climate of the trucking industry has changed considerably during this decade as evidenced by three rather significant developments. As a result, the continued adherence to the filed rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. First of all, by enacting the Motor Carrier Act of 1980, Pub. L. No. 98-296, 94 Stat. 793, (49 U. S. C. A. Sections 10101 et seq.), Congress intended to substantially deregulate the industry by allowing carriers and shippers to negotiate rate arrangements more freely. See, e. g., Maislin Industries v. Primary Steel, Inc., No. 85-0021 -CV-W-JWD, - F. Supp. - (W. D.

Mo. July 22, 1988); and Orr v. I.C.C., 703 F. Supp. 676 (W. D. Tenn. 1988).

The second important development came about due in part to Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635(11th Cir. 1986). Title 49 U. S. C. A. Section 10701(a) provides that a rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable. In Seaboard the Eleventh Circuit was dealing with a rail carrier's petition for review of an order of the Interstate Commerce Commission determining that the collection of undercharges was unreasonable in that case and waiving the collection from the shipper. Relying in part on Nader v.Alleghany Airlines, Inc., 426 U.S. 290,

96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976), the Court agreed with the Commission that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Seaboard, 794 F. 2d at 638. The Court, agreeing with the Commission "that `changed circumstances' warranted a re-examination of its previous policy of refusing to consider equitable defenses," stated:

The Commission's action in this case is both justified and within its jurisdiction. It is not contrary to Maxwell and related cases, as those dealt only with the Court's authority to grant equitable defenses to undercharge actions. The Interstate Commerce Act, as

amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, it reposed in the ICC. Cf. Nader, 426 U.S. at 304, 96 S. Ct. at 1987. Nothing prohibits the ICC from changing its policy on enforcing the `unreasonable practice' provision of section 10701(a).

The third important development was the change in the policy of the Interstate Commerce Commission as set forth in its Negotiated Rates opinion in Ex Parte No. MC-177 (Oct. 29,1986) Declaring that it had been directed by 49 U. S. C. A. Section 10101(a)(2) to encourage competitive, innovative, and

individualized price and service options to meet changing market demand the Commission held it would recognize equitable defenses on a case by case basis where it is shown that to allow collection of undercharges would be an unreasonable practice. In other words, the Commission decided that in some cases it might very well be an unreasonable practice to allow carriers to negotiate a rate below the tariff to gain business and then later bring suit to recover the "undercharges" after completing the job and after accepting payment at the negotiated rate. The ICC cited as authority 49 U. S. C. A. Section 107701(a) which requires practices under ICC authority to be reasonable and Section 10704(a) (1) which authorizes the Commission to order a carrier to stop a violation. Orr. v. I.C.C., 703 F. Supp.

at 677; Younger v. TMBR Drilling, Inc., No. Mo-85-CA20 (W. D. Texas, Sept. 23, 1987) and Maislin Industries, supra. Thus, the law in this area has entered a new era but there is a split of authority as to whether the Commission:

(1) has authority or jurisdiction to declare a "practice" unreasonable and thus circumvent the filed rate doctrine, i. e., whether referral to the Commission is proper; (2) whether such a position is contrary to well-settled law, and (3) whether the courts can or should adopt the findings of the Commission as to unreasonable practices.

The Defendant claims and the Court agrees that the issues raised in this cause are within the primary jurisdiction of the ICC. In reaching this conclusion the Court relies upon the statute,

[Section 10701 (a)], the ICC opinion [Ex Parte No. MC-177]; Seaboard v. United States, supra; Motor Carrier v. Family Dollar, 670 F. Supp. 644 (W.D. N.C. 1987); Orr v. I.C.C., supra, and Younger v. TMBR Drilling, Inc., supra.

Having reached the conclusion that the ICC has primary jurisdiction of the issues in this cause it follows that the matter should be referred to the Commission and that further proceedings in this Court be stayed until the Commission acts. United States v. Western Pacific R. Co., 352 U.S. 61, 77 S. Ct. 161 at 165.

A judgment will be entered reversing the judgment of the Bankruptcy Court and referring the issue to the Interstate Commerce Commission for a determination

as to whether the collection of the undercharges in this case would be an unreasonable practice. Further proceedings will be stayed in this Court until the Commission rules on the matter.

This the 21st day of April, 1989.

[Paragraph 83,465] Carolina Motor Express, Inc., 1. D. No. 56-1299892.

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., and Mark & Associates of North Carolina, Inc., Plaintiffs v. Peter C. Reiter, Defendant, SH-C-88-138.

United States District Court For the Western District of North Carolina, April 25, 1989.

Federal court-Referral of undercharge action --Primary jurisdiction of ICC.-- A federal district court has allowed a shipper to refer an undercharge claim brought against it by a carrier to the ICC for consideration. The court concluded that the Commission has primary jurisdiction in this action to determine whether, under the facts of this case, it would be an unreasonable practice for the shipper to be required to pay the undercharge claim.

Woodrow W. Jones, United States District Judge: This cause is before the Court upon an appeal by the Defendant, and a cross-appeal by the Plaintiffs, pursuant to 28 U. S. C. A. Section 158(a), from a final judgment of the United States Bankruptcy Court for the Western District of North Carolina. This

Court heard arguments from counsel for both parties on April 7, 1989, in Rutherfordton, North Carolina.

Plaintiffs, Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., and Mark & Associates of North Carolina, Inc., originally brought this action seeking to recover alleged undercharges. Plaintiffs alleged the rates paid by Defendant for various shipments of freight were less than the rates on file with the Interstate Commerce Commission (ICC).

Defendant answered by alleging that: (1) the rates Plaintiffs seek to collect are unreasonable and unlawful in violation of 49 U. S. C. A. Section 10701(a); (2) the tariff sections containing the rates Plaintiffs seek to

apply to the shipments in question are not the applicable sections of said tariffs, and if applied to the shipments in question, would violate 49 U. S. C. A. Sections 10761 and 10762; and (3) allowing the collection of the tariff rates after lower rates have been negotiated and agreed upon by both parties is an unreasonable practice in violation of 49 U. S. C. A. Section 10701(a).

Defendant further disputes the nature of the authority under which the shipments were moved. Defendant argues that all shipments were moved pursuant to Carolina's contract carriage authority as opposed to common carriage authority. Defendant alleges the shipments were moved pursuant to a valid, binding contract between Carolina and Defendant.

Therefore the filed tariff provisions of the Interstate Commerce Act would not apply.

Defendant filed a motion for referral to the ICC. The motion was denied by the Bankruptcy Court. The case was tried before that Court upon stipulated facts which are not in dispute before this Court.

The Bankruptcy Court found the defense of contract carriage to be non-existent in this case. It found that Defendant's reliance on the rate negotiated was unreasonable and that even had there been reasonable reliance, the "filed rate" doctrine is still the law requiring judgment in favor of Plaintiffs on the undercharge claim in the sum of $13,795.73. The Court refused to approve

attorneys fees finding the conduct of both parties to be such that each bear its own costs. As to interest on the undercharges the Court allowed the statutory rate from the date of judgment until paid but refused to award any prejudgment interest.

The Defendant appeals the Bankruptcy Court's judgment alleging that: (1) under the doctrine of "primary jurisdiction" the Court should have referred the case to the Interstate Commerce Commission for the determination of the reasonableness and applicability of the tariffs, (2) that Carolina moved the goods as a contract carrier,thus the filed rate doctrine should not apply, and, (3) that the practice of assessing higher freight rates and charges than those agreed upon constitutes an unreasonable, unlawful,

unfair, and deceptive practice. Plaintiffs cross-appeal claiming the Bankruptcy Court's denial of Plaintiffs' request for prejudgment interest and attorneys fees, provided for in Carolina's filed tariffs, is contrary to law.

There is no dispute as to the facts of this case. At the trial before the Bankruptcy Court the parties stipulated to the following essential facts. The Plaintiff, Langdon M. Cooper, is the duly appointed and acting Trustee of Carolina Motor Express, Inc., (hereinafter Debtor), appointed by the Court on November 7, 1986 upon the filing of a petition under Chapter 11, later converted to a petition for relief under Chapter 7, of the United States Bankruptcy Code. Mark & Associates, also

Plaintiff in this action, was hired to audit the Debtor's bills and records and was approved by the Court to perform this task The Debtor operated at all times under consideration in these proceedings as a motor carrier transporting freight in interstate commerce pursuant to both contract and common carriage authority issued by the ICC. The Debtor filed a tariff provision with the ICC on June 4, 1985, effective June 16, 1985, which provides that a late payment charge of 1.25% per month be applied to all freight bills which are not paid within (15) days of delivery of the underlying freight and that when payment is not made within (30) days and it becomes necessary to refer the matter to an attorney for collection, the Debtor is entitled to reimbursement of reasonable attorneys fees computed at 33% of the transportation and late

payment charges.

The Defendant, Peter C. Reiter, operates a sole proprietorship in Fountain Valley, California authorized by the ICC as a broker of transportation by motor vehicle. As such, Defendant is subject to the ICC regulations codified at 49 C. F. R. 1045. The Defendant tendered freight to the Debtor for transportation in interstate commerce which was transported by Debtor pursuant to its authority from the ICC. The Plaintiff Mark audited all of the freight bills by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC and which was in effect on the date of each shipment handled for the Defendant.

The results of said audit showed a balance due of $13,795.73 which represents the balance due and owing to the Debtor by the Defendant for transportation charges rated pursuant to the lowest applicable common carrier tariff after all credits had been issued to the Defendant for previous payments made to the Debtor.

The Defendant was aware at all times involved in this proceeding that the Debtor, when transporting freight as a common carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. The Debtor's employees or agents, as an inducement to secure the Defendant's business, orally quoted to the Defendant certain freight rates and charges for the transportation of specified commodities

between named origin and destination points. The quoted freight rates and charges were discussed by the Defendant and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. Daring those negotiations the Debtor's employees or agents represented to the Defendant that the quoted rates and charges would cover the period that the shipments moved. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by the Defendant. The Defendant believed that the Debtor would publish the quoted freight rates in its tariff filed with the ICC. The Defendant requested the Debtor to furnish it a copy of its tariff, but it was never produced. Debtor represented to Defendant that the tariff was too "voluminous." The Debtor's

original freight bills for the shipments confirmed the negotiated freight rates and charges and confirmed the Defendant's belief that the Debtor had published the negotiated rates and charges in appropriate tariffs, filed properly with the ICC. The Defendant was billed for the shipments at the negotiated rates, and the Defendant has now paid all of such charges.

After Defendant had made payment of the original transportation charges, Plaintiffs billed Defendant at a higher rate for the same shipments, alleging that the higher rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period when the shipments moved and confirmed that the negotiated rates were never published by the Debtor in tariffs

filed with the ICC. Based upon the negotiated rates and charges agreed upon by the parties, the Defendant relied upon the representation of the employees and agents of the Debtor and utilized the Debtor's services, instead of other available motor carriers. Although the Defendant believed it had a contract with the Debtor, a written, bilateral contract, imposing specific obligations upon both the Defendant and the Debtor, and covering the shipments, was never executed by the Defendant and the Debtor.

The Plaintiffs rely upon the provisions of 49 U. S. C. A. Section 10761(a) and the various court decisions construing the section for their support of the claims in this cause. The pertinent part of Section 10761(a) is as follows:

> That a carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Court interpretation of this statute has created the "filed rate" doctrine which is simply a rule of law that requires carriers subject to the Interstate Commerce Act to collect and for their shippers to pay, all lawful charges set forth in the applicable

tariffs. Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94, 97, 35 S. Ct. 494, 495, 59 L. Ed. 853 (1915). This case holds that the rate of the carrier duly filed is the only lawful charge and deviation from it is not permitted upon any pretext. The purpose of the "filed rate" doctrine is to prevent carriers from giving by secret agreements discriminatory preferences to large volume shippers. See Armour Packing Co. v. United States, 209 U. S. 56, 81, 28 S. Ct. 428, 435, 52 L. Ed. 681 (1908). Generally, these cases hold that affirmative defenses are not available to a carrier's claim for undercharges.

The Defendant says and contends that this case should not be determined by the "filed rate" doctrine but instead that Plaintiffs' claim should be referred to

the Interstate Commerce Commission for a determination of whether the carrier's attempt to collect undercharges in this case constitutes an unreasonable practice. This contention is based upon the provisions of 49 U. S. C. A. Section 10701(a) which provides that "a rate (other than a rail rate), classification rule, or practice related to transportation or services provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable." (emphasis added). The Defendant contends that the Commission has "primary jurisdiction" to determine whether the practice in this case is reasonable. "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim

requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pacific Railroad Co., 352 U. S. 59, 63-64, 77 S. Ct. 161, 164 165, 1 L. Ed. 2d 126 (1956).

The Defendant relies upon the statute, a recent court decision, Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635 (11th Cir. 1986) and an ICC policy statement to support its motion to refer this matter to the ICC. The Defendant contends that if the Commission found that Plaintiffs' attempt to collect the undercharges under the facts of this case is an unreasonable

practice such decision would provide the basis for a defense of equitable estoppel to the Plaintiffs' claim in this Court. In Seaboard, the court reviewed and affirmed an ICC determination that a carrier was barred from collecting undercharges. The Court noted that the Commission had departed from its prior decisions regarding the "filed rate" doctrine but approved such action because the changed policy was in keeping with the Commission's statutory mission as set forth in the Act. Id. at 639. In 1986 the Commission adopted a policy statement which provides among other things:

"In light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses . . . [and] if a case is referred to the (ICC, it] will decide if the collection of the

undercharges would be an unreasonable practice." In reaching this conclusion the ICC discussed and defended its policy statement. If admitted that it did not have the authority to abrogate Section 10761 and therefore could not order the waiver of undercharges since the United States District Courts are the only bodies that can hear undercharge cases. Nevertheless, the Commission defended on several grounds its authority to consider all the circumstances surrounding an undercharge action brought in district court.

First, the Commission cited Seaboard, supra, as authority for the proposition that Section 10701(a) gives it the authority to consider whether a particular undercharge suit is an unreasonable practice.

Second, the Commission asserted that in particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim of undercharges. That the filed rate doctrine was not intended to condone or reward carriers where such carrier's action may constitute fraudulent business practices.

Third, the Commission recognized that a new regulatory environment may have been produced by the Motor Carrier Act of 1980 and that, therefore, a fresh look was required in order to formulate the "proper regulatory response to the matter of unfiled negotiated motor carrier rates."

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Carrier Act of 1980 dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice . . . Hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file. (Ex Parte No. MC-177, Oct. 29, 1986.)

The Commission has the statutory

duty to determine whether a practice being conducted by a common carrier is reasonable and therefore invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was un reasonable to it for an advisory opinion. Some courts have decided to take advantage of the expertise of the Commission in this field and stayed the proceeding while the issue was presented for review. Others have refused including the Bankruptcy Judge in this case. Briefly stated the Bankruptcy Judge determined that the "defense of contract carriage is nonexistent and reliance by the Defendant on the negotiated rate was not reasonable, and even if it had been found to be reasonable that the `filed rate' doctrine is still the law of the land .

. . " The Bankruptcy Court also denied the Defendant's motion to refer the matter to the ICC on the grounds that such referral would be improper and would result in an unnecessary delay of the proceedings.

This Court finds and concludes that the Bankruptcy Judge erred as a matter of law in failing and refusing to refer to the ICC the issue of whether under the facts of this case it would be an unreasonable practice for the shipper to be required to pay the undercharge claim. This Court will therefore enter a judgment reversing the judgment of the Bankruptcy Court and ordering the issue referred to the Interstate Commerce Commission.

The facts in this case are basically

undisputed. Carolina provided regulated transportation of goods in interstate commerce to the Defendant and the rate charged, billed and paid was less than the filed rate. Title 49 U. S. C. A. Section 10762(a)(1) of the Interstate Commerce Act, requires all motor common carriers to publish and file a tariff containing their rates for transporting freight. This rate becomes the legal rate and the carrier is obligated to charge and collect that rate.

Historically there have been no exceptions to this rule, known as the "filed rate doctrine." The Supreme Court stated almost seventy-five years ago that, "ignorance or misquotation is not an excuse for either paying or charging less or more than the rate filed." Louisville & Nashville Railroad Co. v.

Maxwell, supra. The rationale underlying the filed-rate doctrine is to avoid rate discrimination in favor of large shippers through secret agreements with carriers. Louisville & Nashville Railroad Co. v. Maxwell, supra; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27 (1919). Thus, in the past, shippers have been precluded from raising equitable defenses in undercharge actions by common carriers under the filed rate doctrine. See, e. g., Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F. 2d 1360 (D. C. Cir. 1980) and Nyad Motor Freight, Inc. v. W. T. Grant Co., 486 F. 2d 1112 (2nd Cir. 1973).

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significant developments. As a result, the continued adherence to the filed rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. First of all, by enacting the Motor Carrier of 1980, Pub. L. No. 96-296, 94 Stat. 793, (49 U. S. C. A. Section 10101 et seq.), Congress intended to substantially deregulate the industry by allowing carriers and shippers to negotiate rate arrangements more freely. See e.g. Maislin Industries v. Primary Steel, Inc., No. 85-0021-CV-W-JWD, -- F. Supp. -- (W.D. Mo. July 22, 1988); and Orr v. I. C. C., 703 F. Supp. 676 (W.D. Tenn. 1988).

The second important development came about due in part to Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635 (11th Cir. 1986). Title 49 U. S.

C. A. Section 10701(a) provides that a rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable. In Seaboard the Eleventh Circuit was dealing with a rail carrier's petition for review of an order of the Interstate Commerce Commission determining that the collection of undercharges was unreasonable in that case and waiving the collection from the shipper. Relying in part on Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976), the Court agreed with the Commission that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Seaboard, 794 F. 2d at 638. The Court,

agreeing with the Commission "that 'changed circumstances' warranted a re-examination of its previous policy of refusing to consider equitable defenses," stated:

> The Commission's action in this case is both justified and within its jurisdiction. It is not contrary to Maxwell and related cases, as those dealt only with the Court's authority to grant equitable defenses to undercharge actions. The Interstate Commerce Act, as amended, still embodies the policies of non-discrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. Cf. Nader,

426 U. S. at 304, 96 S. Ct. at 1987. Nothing prohibits the ICC from changing its policy on enforcing the `unreasonable practice' provision of section 10701(a).

The third important development was the change in the policy of the Interstate Commerce Commission as set forth in its Negotiated Rates opinion in Ex Parte No. MC-177 (Oct. 29, 1986). Declaring that it had been directed by 49 U. S. C. A. Section 10101(a)(2) to encourage competitive, innovative, and individualized price and service options to meet changing market demand the Commission held it would recognize equitable defenses on a case by case basis where it is shown that to allow collection of undercharges would be an

unreasonable practice. In other words, the Commission decided that in some cases it might very well be an unreasonable practice to allow carriers to negotiate a rate below the tariff to gain business and then later bring suit to recover the "undercharges" after completing the job and after accepting payment at the negotiated rate. The ICC cited as authority 49 U. S. C. A. Section 10701(a) which requires practices under ICC authority to be reasonable and Section 10704(a)(1) which authorizes the Commission to order a carrier to stop a violation. Orr v. I. C. C., 703 F. Supp. at 677; Younger v. TMBR Drilling, Inc., No. Mo-85-CA20 (W. D. Texas, Sept. 23, 1987) and Maislin Industries, supra. Thus, the law in this area has entered a new era but there is a split of authority as to whether the Commission: (1) has

authority or jurisdiction to declare a "practice" unreasonable and thus circumvent the filed rate doctrine, i. e., whether referral to the Commission is proper; (2) whether such a position is contrary to well-settled law, and (3) whether the courts can or should adopt the findings of the Commission as to unreasonable practices.

The Defendant claims and the Court agrees that the issues raised in this cause are within the primary jurisdiction of the ICC. In reaching this conclusion the Court relies upon the statute, [Section 10701(a)], the ICC opinion [Ex Parte No. MC-177]; Seaboard v. United States, supra; Motor Carrier v. Family Dollar, 670 F. Supp. 644 (W. D. N. C. 1987); Orr v. I.C.C., supra, and Younger v. TMBR Drilling, Inc., supra.

Having reached the conclusion that the ICC has primary jurisdiction of the issues in this cause it follows that the matter should be referred to the Commission and that further proceedings in this Court be stayed until the Commission acts. United States v. Western Pacific R. Co., 352 U. S. 61, 77 S. Ct. 161 at 165.

A judgment will be entered reversing the judgment of the Bankruptcy Court and referring the issue to the Interstate Commerce Commission for a determination as to whether the collection of the undercharges in this case would be an unreasonable practice. Further proceedings will be stayed int his Court until the Commission rules on the matter.

This the 21st day of April, 1989.

[¶83,361] Carolina Motor Express, Inc., I.D. No. 56-1299892; Case No. SH-B-86-00226.

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., Plaintiffs v. California Consolidated Enterprises, Inc., and Peter C. Reiter, Defendants; Adversary Proceeding Nos. 86-0498 and 87-0028.

United States Bankruptcy Court for the Western District of North Carolina, Shelby Division, March 16, 1988.

Recovery of freight undercharges--Filed-rate doctrine--Upheld.--In an action in which a carrier sought to recover undercharges from certain shippers for services rendered, a federal bankruptcy court concluded that reliance by the shippers on negotiated

rates was not reasonable since the "filed-rate" doctrine took precedence. Because the carrier operated as a motor common carrier transporting freight in interstate commerce pursuant to authority issued by the ICC, it was required to charge all of its customers tariff rates it had on file with the ICC. In spite of the fact that the carrier's employees or agents, as an inducement to secure the shippers' business, orally quoted to the shippers certain freight rates and charges for the transportation of specified commodities. These rates were never published by the carrier in its filed tariffs. The Shippers failed to make a reasonable investigation or check with regard to the legal tariffs. The court found that the shippers were ICC licensed brokers who were bound by laws and ICC regulations concerning the

payment of freight charges.

Back references.-189.03; 192.43; 247.75.

Undercharges--Contract carriage claim --Found non-existent.-- There was no merit to the claim that the shippers dealt with the carrier as a contract carrier, and that the rates agreed upon by themselves and the carrier were part of the oral contract. None of the shippers executed written, bilateral contracts with the carrier which imposed specific obligations upon both the carrier and each of the shippers, and which covered a series of shipments as required by the ICC regulations for contract carriage. Also, the shippers have failed to show that they had any agreement with the carrier which provided that the carrier would dedicate equipment for a continuing period of time for their exclusive use,

or provide special equipment or services designed to meet the carrier's distinct needs, as required for contract carriage under the Interstate Commerce Act. A contract limited to the freight bills and bills of lading is specifically excluded from the definition of contract carriage. Furthermore, referral of the proceeding to the ICC would be improper and any decision rendered by the Commission therefrom is considered a nonbinding advisory opinion.

Back references.-189.03; 192.43; 247.75.

Opinion delivered by U.S. Bankruptcy Judge Wooten: These Matters coming on to be heard and being heard before the undersigned Judge presiding over the United States Bankruptcy Court for the Western District of North Carolina, on February 16, 1988, at a

bench trial on the Complaints of Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., Debtor, and Mark & Associates of North Carolina, Inc., as Plaintiffs, seeking money damages against California Consolidated Enterprises, Inc. and Peter C. Reiter, Defendants, for the failure of Defendants to fully pay freight charges owed to the Debtor for services rendered by the Debtor to these Defendants; and the parties having stipulated to all facts at issue in these proceedings and having agree to consolidate these proceedings for trial; and the Court, after reviewing the record and stipulated facts in these proceedings, and after hearing the argument of counsel, pursuant to Bankruptcy Rule 7052 makes the following Findings of Facts and Conclusions of Law:

Findings of Facts

These actions arose upon the filing of Complaints jointly by Langdon M. Cooper, the duly appointed qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor") and Mark & Associates of North Carolina, Inc. (hereinafter called "Mark") against the Defendants who are former customers of the Debtor. Pursuant to an audit contract approved by this Court on July 15, 1986, Mark audited the Defendants' freight bills for the purpose of determining whether said bills were properly rated according to the common carrier tariffs that the Debtor had on file with the Interstate Commerce Commission (ICC) and which were in effect at the date of each shipment.

The Debtor operated at all times

under consideration in these proceedings as a motor common carrier transporting freight in interstate commerce pursuant to authority issued by the ICC. As such, the Debtor was required to charge all of its customers pursuant to the tariffs it has on file with the ICC. The Debtor, however, did not initially charge the Defendants in these proceedings its published tariff rates.

Defendant, California Consolidated Enterprises, Inc. (hereinafter "CCE"), is a California corporation with a principal place of business at 14704 Radburn, Santa Fe Springs, California.

The Debtor's employees or agents, as an inducement to secure CCE's business, orally quoted to CCE certain freight rates and charges for the transportation of specified commodities between named origin and destination

points. The quoted freight rates and charges were discussed by CCE and the Debtor's agents in various telephone conversations between them, and were set forth in a letter.

Following the completion of the negotiations between the parties, the quoted freight rates were accepted by CCE. During those negotiations the Debtor's agents or employees represented to CCE that the quoted freight rates and charges would cover the period that the shipments moved. CCE believed that the Debtor would publish the quoted freight rates in its tariffs filed with the ICC. CCE asked the Debtor for a copy of its tariff, but it was never produced.

The Debtor's original freight bills for the shipments confirmed the negotiated freight rates.

CCE was billed for the shipments at

the negotiated rate, and CCE has paid to the Debtor all the original transportation charges for the shipments, with the exception of an uncontested balance owing the Debtor of $4,804.55 for previous unpaid invoices.

After CCE had made payment of the original transportation charges, the Plaintiffs billed CCE higher rates and charges for the same shipments, alleging that the higher freight rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period from December of 1983 through April of 1986, when the shipments moved. The orally quoted, agreed upon, and confirmed freight rates and charges were never published by the Debtor in tariffs filed with the ICC.

Based on the negotiated freight rates and charges agreed upon by the parties,

and which were originally assessed by the Debtor, on the shipments paid in full by CCE, CCE unreasonably relied on the representation of the employees and agents of the Debtor, and utilized the Debtor, instead of other available motor carriers, and failed to make any reasonable investigation, or check with regard to the legal tariffs, all of which they were equipped by knowledge and experience so to do, in short, through blind and unreasonable faith, Defendants participated in the illegal action of the Debtor to the detriment of the then Debtor entity.

Defendant, Peter C. Reiter (hereinafter called "Reiter") is a sole proprietorship with a principal place of business at 1041 Parakeet Circle, Fountain Valley, California.

The Debtor's employees or agents, as an inducement to secure Reiter's

business, orally quoted to Reiter certain freight rates and charges for the transportation of specified commodities between named origin and destination points. The quoted freight rates and charges were discussed by Reiter and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. During the negotiations the Debtor's agents or employees represented to Reiter that the quoted freight rates and charges would cover the period that the shipments moved. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by Reiter. Reiter believed that the Debtor would publish the quoted freight rates in its tariffs filed with the ICC. Reiter asked the Debtor for a copy of its tariff, but it was never produced, on the grounds that

it was too "voluminous."

The Debtor's original freight bills for the shipments confirmed the negotiated rate, and Reiter paid to the Debtor these original bills in full.

After Reiter had made payment of the original transportation charges, the Plaintiffs billed Reiter higher rates and charges for the same shipments, alleging that the higher freight rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period from January of 1985 through April of 1986, when the shipments moved.

The orally quoted, agreed upon, and confirmed freight rates and charges were never published by the Debtor in tariffs file with the ICC.

Based on the negotiated freight rates and charges agreed upon by the parties, and which were originally assessed by

the Debtor, on the shipments paid in full by Reiter, Reiter unreasonably relied on the representation of the employees and the agents of the Debtor, and utilized the Debtor, instead of other available motor carriers, and failed to make any reasonable investigation, or check with regard to the legal tariffs, all of which they were equipped by knowledge and experience so to do, in short, through blind and unreasonable faith, Defendants participated in the illegal action of the Debtor to the detriment of the then Debtor entity.

Both defendants are ICC licensed brokers who, pursuant to 49 C.F.R. Section 1045.10, are bound by laws and ICC regulations concerning the payment of freight charges.

Pursuant to the freight bill audit contract, Mark audited all of the

shipments handled by the Debtor for each of the Defendants by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC, and which was in effect on the date of each shipment was handled for each Defendant.

The results of said audit produced balance invoices in the amounts of $58,793.03 owed by CCE and $13,795.73 owed by Reiter.

In addition to these balance due freight bills, the audit performed by Mark also revealed that Defendant CCE had failed to pay original invoices in the amount of $24,201.90. On March 31, 1987, CCE paid the Trustee $16,277.35 and submitted a proof of claim for $3,120.00, leaving an uncontested account receivable owed the Debtor of $4,804.55.

In response to the audit findings, Defendants claim that they dealt with the Debtor as a contract carrier, and that the rates agreed upon by themselves and the debtor were part of an oral contract. Alternatively, CCE and Reiter claim that they dealt with the Debtor as a common carrier, and relied upon the Debtor to file its negotiated rates with the ICC.

Additionally, each of the defendants has moved the Court for referral to the ICC. The asserted purpose of the Defendants' requests for ICC referral is to obtain an advisory determination frogm the ICC as to whether or not the Debtor's practices were unreasonable, and whether the Trustee and Mark should be permitted to enforce the filed tariff rates. The Court previously denied CCE and Reiter's Motion for Referral to the ICC by Order entered

March 25, 1987. These Defendants, reasserted their Motions to Refer at trial.

The Defendants were aware at all times involved in this proceeding that the Debtor, when transporting freight as a common carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. The Defendants negotiated rates with the Debtor without obtaining a copy of the Debtor's tariffs to verify that the Debtor had, indeed, filed these negotiated rates with the ICC.

While Defendants also raise as defense that they dealt with the Debtor as a contract carrier, none of the Defendants executed written, bilateral contracts with the Debtor which imposed specific obligations upon both the Debtor and each of the Defendants, and

which covered a series of shipments as required by the regulations for contract carriage codified at 49 C.F.R. 1053.1.

In addition, the Defendants have failed to show that they had any agreement with the Debtor which provided that the Debtor would dedicate equipment for a continuing period of time for their exclusive use, or provide special equipment or services designed to meet the Defendants' distinct needs, as required for contract carriage under the interstate Commerce Act. 49 U.S.C. Section 10102(15).

The Debtor's contract carriage Permit also provides that the Debtor may operate as a contract carrier only so long as the Debtor executes contracts pursuant to 49 C.F.R. 1053. The Permit further states that while it is unnecessary to file the contract with

the ICC "the execution of contracts must be accomplished."

Since the Court finds that there is no valid contract carriage, and since the parties have previously stipulated that the audit performed by Mark resulted in the lowest applicable common carrier charges, the Court adopts the audit findings by Mark as proper in all respects.

Each of the Defendants was billed for the shipments at the negotiated rate, and each Defendant paid the Debtor its original transportation charges with the exception that at trial CCE still owed the Debtor $4,804.55.

Although each of the Defendants claimed it relied upon the Debtor to file the negotiated rates, the Court finds that such reliance was not reasonable as each of the defendants is a sophisticated shipper, who was dealing

with a sophisticated carrier. All of the parties knew the rules and regulations concerning tariff filings and yet they proceeded to conduct business as if there were no such requirements.

The Court further finds and concludes that even if the Defendants' reliances were to be considered reasonable, and facts were developed sufficient to constitute "fraud" on behalf of the Debtor, the Court finds that the "filed rate" doctrine precludes the assertion of "equitable defenses" such as detrimental reliance or fraud, and that the Plaintiffs are entitled to recover regardless of the conduct of the Debtor.

The Debtor has a tariff provision on file with the ICC which provides, effective June 16, 1985, that a late payment charge of 1.25% per month is to be applied to all freight bills which

are not paid within fifteen (15) days of delivery. This tariff also provides that the Debtor is entitled to reimbursement of reasonable attorney's fees in the amount of 33% of the transportation charges and the late payment charges should payment not be made within thirty (30) days of presentation of freight bills. The Court finds that this tariff provision is applicable only with respect to the original accounts receivable owed by CCE. The Court will not approve attorney's fees or interest on any of the undercharged amounts.

Discussion and Conclusions of Law

These matters arise from Title 11 (11 U.S.C. Sections 101, et seq.) and were properly called for trial before this Court on January 16, 1988, after notice to all parties, and this Court had jurisdiction over these adversary

proceedings pursuant to 28 U.S.C. Section 1334, said proceedings having been properly referred by this Court pursuant to 28 U.S.C. Section 157(a). Furthermore, this Court finds that these adversary proceedings are related to the case under Title 11 and are properly before this Court pursuant to 28 U.S.C. Section 157(c).

At pre-trial conferences, the Court asked the parties whether they desired to have these proceedings handled as dispositive matters or subject to de novo review by the District Court as provided in 28 U.S.C. Section 157(c). The Court notes from the record in these proceedings that all parties agreed to have the Court issue dispositive rulings pursuant to 28 U.S.C. Section 157(c)(2).

Since There Is No Written Bilateral Contract Between the Debtor and Each

of the Defendants, As A Matter of Law There Can Be No Contract Carriage Relationship Between the Parties.

It is well settled that a carrier can operate both as a common and contract carrier. **Regular Common Carrier Conference v. United States**, 803 F.2d 1186, 1189 (D.C. Cir. 1986). A motor common carrier is defined by the Interstate Commerce Act as "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. Section 10102(14). In contrast, a motor contract carrier is defined as:

> a person providing motor vehicle transportation of property for compensation under **continuing agreements** with one or more persons --(i) by assigning motor vehicles for a continuing period of time for the **exclusive** use of each such person; or

(ii) designed to meet the **distinct needs** of each such person. (Emphasis supplied).

49 U.S.C. Section 10102(15)(B).

"Continuing agreements" is defined in the Code of Federal Regulations as meaning a **written, bilateral** agreement. 49 C.F.R. Section 1053.1. This regulation provides in pertinent part that no contract carrier shall transport property for hire in interstate or foreign commerce.

> ...except under special and individual contracts or agreements which shall be in **writing**, shall provide for transportation for a particular shipper or shippers, shall be **bilateral** and impose specific obligations upon **both** carrier and shipper or shippers, shall cover a **series of shipments** during a **stated period of time** in contrast to contracts of carriage governing individual shipments,...(Emphasis supplied).

Each Defendant has stipulated that it failed to execute a written, bilateral contract, imposing specific obligations

on both itself and the Debtor and covering a series of shipments. (Stip. Nos. 23, 37, 57 and 63). Instead, the Defendants claim to have relied upon the Debtor's oral quotations, or in some instances, written quotations and the original freight bills, to "confirm" the belief that a contract was created. As indicated in the regulation, a "contract" limited to the freight bills and bills of lading is specifically excluded from the definition of contract carriage. Also, a quotation letter, or other written offer is precluded as not "bilateral," and not imposing specific obligations upon the shippers.

Besides failing to comply with the spirit and intent of the ICC Regulations governing contract carriage, the Defendants and the Debtor failed to comply with the pre-

conditions outlined in the Debtor's contract carriage permit (attached as Exhibit "B" to the Stipulated Facts). On the face of the Permit it is clearly stated: "this authority will be effective as long as the carrier maintains compliance with the requirements pertaining to ... the execution of contracts (49 C.F.R. 1053)." The Permit further states "while the execution of contracts must be accomplished, it is unnecessary to file them with the Commission." (Emphasis supplied). The Defendants admit in the Stipulation of facts that there are no "executed" contracts governing the involved transportation.

A further analysis of each of the Defendants' contract carriage claim reveals the weakness of their arguments. CCE bases its contract carriage claim on the oral

representations of the Debtor (i.e., rate quotes) and one letter written by the Debtor's Director of Sales (Exhibit "D" to the Stipulated Facts). The letter makes no mention that the Debtor seeks to handle CCE's freight as a contract carrier, nor does the letter contain a promise on behalf of CCE to tender the Debtor, even a single shipment of freight. The letter also fails to indicate that the Debtor will provide CCE with any specialized service, or dedication of equipment as is required by the statutory definition of contract carriage. 49 U.S.C. Section 10102(15).

Similarly, Defendant Reiter relies solely upon a rate quotation letter of the Debtor (letter attached as Exhibit "E" to the Stipulated Facts). In this letter, the Debtor's Director of Operations refers to the Debtor's

operating certificate (i.e. common carrier certificate). He does not mention that the Debtor had contract carrier authority (which it did not obtain until 77 days after this letter was written) or that a copy of the contract carriage permit was enclosed with the letter. Also, the letter implies that the Debtor will be charging Defendant Reiter a rate which is not contained in its tariffs. Reiter stipulated that it was aware that the law and ICC regulations required the Debtor to change its tariff rates. (Stip. No. 30). The fact that Reiter chose not to obtain copies of the Debtor's rates prior to engaging the Debtor indicates that its reliance upon the Debtor to file the negotiated rates was not reasonable. Also, the letter does not indicate that the Debtor will provide Reiter with any specialized service or dedication of equipment.

In **West Coast Truck Liners, Inc. v. Kaiser Aluminum and Chemical Co.**, 1987 Fed. Carr. Cas. (CCH) para. 83,336 (N.D. Cal. 1987), the District Court explained the need for a written contract for carriage to apply:

> A 'continuing agreement' has been interpreted to mean a written bilateral agreement 49 C.F.R. Section 1053.1 (1982). Under the oral agreement West Coast was providing its services as a motor common carrier while under the transportation agreement, West Coast acted as a motor contract carrier. Id., at p. 58,487.

In **West Coast** the Court found that although the Plaintiff motor carrier had both common and contract carriage authority so long as it was handling goods pursuant to, "an oral agreement; it was acting as a 'motor common carrier,' not as 'motor contract carrier.' See 49 C.F.R. Section 1053.1. Therefore, the filed rate doctrine applies." Id. at p. 58,488.

The facts here just do not fit contract carriage. It is a pure and simple matter of common carriage and the Defendants' arguments for the finding of a contract carriage arrangement between the parties must fail.

The Defendants' Characterization of Plaintiffs' Actions For Freight Undercharges Pursuant to Properly Filed Tariffs As An Unreasonable Practice Contravenes Clear Legal Precedent

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In **Louisville & N.R.R. v. Maxwell**, 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. (Emphasis supplied).

In **Armour Packing Co. v. U.S.**, 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates. See, e.g., **Thurston Motor Lines v. Jordan K. Rand, Ltd.**, 460 U.S. 533, 534-35 (1983) (carrier has absolute right to collect tariff charges on every shipment); **Southern Pacific Transportation Co. v.**

Commercial Metals Co., 456 U.S. 336, 343-44 (1982)(equitable defense of carrier's violation of ICC credit regulations rejected); **Baldwin v. Scott County Milling Co.**, 307 U.S. 478, 484-85 (1939); **Louisville & N.R.R. v. Central Iron & Coal**, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and **Louisville & N.R.R. v. Rice**, 247 U.S. 201, 202 (1918) (where the Court stated that a carrier's claim is, of necessity, predicated on the tariff -- not an understanding with the shipper).

The U.S. Courts of Appeal have also consistently applied the "filed rate doctrine". See **Inman Freight Systems, Inc. v. Olin Corp.**, 807 F.2d 117 (8th Cir. 1986) (estoppel defense of detrimental reliance rejected as

deviation from filed rate is not permitted under any pretext); **Farley Transportation Co. v. Santa Fe Trail Transportation Co.**, 778 F.2d 1365, 1372 (9th Cir. 1985) (penalty provisions in a tariff which provided for charges ten times the normal rate upheld despite carrier's failure to reveal its existence to the shipper); **Louisville & N.R.R. v. Mead Johnson & Co.**, 737 F.2d 683 (7th Cir. 1984) (misquotation of rate held not a bar to later recovery of correct rate); **Fry Trucking Co. v. Shenandoah Quarry, Inc.**, 628 F.2d 1360, 1363 (D.C. Cir. 1980) (carrier awarded difference between agreed upon "contract rates" and published rates); **Illinois Central Gulf Railroad Company v. Golden Triangle Wholesale Gas Company**, 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied

despite repeated assurances by carrier that they would not apply); **Nyad Motor Freight, Inc. v. W.T. Grant Co.**, 486 F.2d 1112, 1114 (2d Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); **Chicago V & R Co. v. Ready Mix Concrete Co.**, 487 F.2d 1263, 1267 (8th Cir. 1973); **Bower & Campbell v. Knox Glass, Inc.**, 390 F.2d 193, 196 (3d Cir. 1968); and **Norfolk & Western R. Co. v. American Comp. St. Corp.**, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of rates. **Consolidated Freightways Corp. v. Terry Truck, Inc.**, 612 F.2d 465 (9th Cir.), **cert. denied**, 447 U.S. 907 (1980) (counterclaim for fraud

dismissed); **Missouri Pacific R. Co. v. Rutledge Oil Co.**, 669 F.2d 557 (8th Cir. 1982) (IC Act precludes shippers from asserting estoppel defense of detrimental reliance); **Paulson v. Greyhound Lines, Inc.**, 628 F. Supp. 881 (D. Minn.), **aff'd**, 804 F.2d 506 (8th Cir. 1986) (fraudulent guarantee of next day delivery not grounds for damages as next day service not contained in tariff).

The ICC's Policy Statement in **Ex Parte No. MC-177 Is Without A Basis In Law And Has Been Rejected by Numerous Courts**

In the face of eight years of contrary judicial precedent, Defendants request this Court to rely upon **Ex Parte No. MC-117. National Industrial Transportation League -- Petition to Initiate Rulemaking on Negotiated Motor Common Carrier Rates**, 3 I.C.C. 2d 99

(1986), in an effort to establish equitable defenses to the requirements of 49 U.S.C. Section 10761(a). At the outset, it should be noted that this is a **non-binding policy statement** which is contrary to years of unwavering judicial statutory construction. The policy statement is inconsistent with the statutory mandate of 49 U.S.C. 10761(a) and is without a reasonable basis in law. Thus, the policy statement is not entitled to deference by this Court. Cf. **SEC v. Sloan**, 436 U.S. 103, 118-19 (1978); **FMC v. Seatrain Lines, Inc.**, 441 U.S. 726, 745 (1973); and **West Coast Truck Lines, Inc. v. Kaiser Aluminum & Chemical Co., supra.**

In **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Georgia-Pacific Corporation**, 1988 Fed. Carr. Cas. (CCH) para. 83,349 (D. Conn.

1987), Chief Judge Daly provided an excellent summation of the development and state of the law in this area. Therein, Chief Judge Daly concluded that Equitable defenses such as that here proffered by Defendants are "statutorily barred." Id., at p. 58,018. The Court found that adherence to the "filed rate doctrine" has been consistently required regardless of the defense sought to be interposed. Further, Chief Judge Daly noted that when Congress rewrote the statutes governing interstate motor carriers it neither explicitly nor implicitly amended the law requiring strict adherence to the filed rate doctrine. The Court also noted that while the ICC is **"free to change its policies, [it] is not free to change a clearly established rule of law."** Id., at p. 58,020.

In Cooper v. California Consolidated Enterprises, Inc. (In re: Carolina Motor Express, Inc.), Adversary Proceeding No. 86-0498 (Bkrtcy. W.D. NC March 25, 1987), this Court stated that Ex Parte No. MC-177:

> ...constitutes at most, an invitation for courts to refer unreasonable practice cases for analysis. The Commission readily admits that consistent with the statutory scheme, the Court retains its authority to set the remedy and accept or reject the Commission's conclusions. Ex parte No. MC-177, p. 8.

slip op., p. 2. See also, West Coast v. Kaiser, supra 1988 Fed. Carr. Cas. (CCH) at 58,488; Taynton Freight System, Inc. v. Tripar Transportation (In re: Taynton Freight System, Inc.), 1988 Fed. Carr. Cas. (CCH) para. 83,343 (Bkrtcy. M.D. Pa. 1987); Oneida Motor Freight, Inc. and Delta Traffic Service, Inc. v. Felsway Corporation (In re: Oneida Motor Freight, Inc.),

1988 Fed. Carr. Cas. (CCH) para. 83,346 (Bkrtcy. D. N.J. 1987).

In Tripar Transportation, supra, judge Thomas C. Gibbons, in denying a request to refer the freight undercharge issue to the ICC stated:

> ...Additionally, even if we were to refer certain issues to the ICC, the Bankruptcy Court retains its authority to set the remedy and accept or reject the ICC's conclusions. After reviewing the facts presented in this case, it is evident that this case does not involve issues reserved for the special competence of an administrative body, and that the Bankruptcy Court must ultimately be the arbiter of this case. Thus, we find that referral of this case to the ICC would involve an unnecessary delay in the resolution of this adversary proceeding.

Id., at p. 58,004.

The Court goes on to state, "we recognize the longstanding doctrine that equitable defenses are not available to shippers faced with uncharged collection actions brought by common carriers". (Citation omitted).

Id., at p. 58,004, n. 3.

Elevating a shipper's reliance on a quoted rate to a cognizable defense sharply departs from the law enacted by the legislature and consistently enforced by the judiciary. As noted by Judge Patel in **West Coast v. Kaiser**, **supra**, at p. 58,488:

> ...efforts to refer matters to the ICC must be reviewed in light of the fact that the ICC does not have the power to reject effective tariffs, **ICC v. American Trucking Ass'ns**, 467 U.S. 354, 363 (1984), reh'g denied, 468 U.S. 1224 (1984) nor the authority to order the waiver of undercharges, **NITL -- Petition to Institute Rulemaking**, 1986 Fed. Car. Cas. (CCH) para. 37,284, at 47,352.

When the alleged unreasonable practice involves a violation of a filed rate (not the reasonableness of the rate itself) the courts and not the ICC have exclusive jurisdiction to determine and apply the proper charge. **I.C.C. v. J.B. Montgomery, Inc.**, 483 F. Sup. 279 (D. Colo. 1980); **Farley v.**

Santa Fe, 778 F.2d at 1370-71.

In **J.B. Montgomery**, the ICC, on behalf of various shippers, sought restitution for past duplicate billings, or overcharges, in addition to prospective injunctive relief. The defendant argued that the cases should have been remanded to the ICC for agency proceedings on whether the defendant's practices were unreasonable and/or discriminatory. The court rejected the defendant's attempt to refer the case to the ICC stating:

> In this case, the primary issue is not the reasonableness of the rates as filed with the ICC, but whether the defendants have been operating in violation of those rates. While the former question clearly does involve the expertise of the ICC, the latter does not.

483 F. Supp. at 281

In **Farley**, the plaintiffs argued that Santa Fe's motion for summary judgment

on the issue of the filed rate doctrine should have been stayed pending referral of the matter to the ICC contending that the tariff which required Farley to pay a penalty of ten times the normal rate for failure to comply with an audit was unreasonable as applied to the facts of its case. Farley did not argue that the tariff provision was unreasonable on its face or that its language was not used in the ordinary sense. Rather, Farley sought referral based on the practice of applying the tariff in its particular case. The Ninth Circuit Court of Appeals rejected this argument finding that referral is not proper where the referring party admits the tariff is unambiguous and reasonable on its face. 778 F.2d at 1371.

In this proceeding the Defendants present no evidence that the involved

tariffs are in anyway confusing or "unreasonable on their face". Rather, each Defendant admits that the Debtor was required to charge pursuant to its "filed rates" and complains only that negotiated rates were not confirmed by a tariff filing. Since there is no dispute as to what are the correct rates, this Court is fully capable of reviewing the application of the involved rates and deciding the amount owed by each Defendant.

In **Civil Aeronautics Board v. Modern Air Transport**, 179 F. 2d 622 at 624 (2d Cir. 1950), the court held that the doctrine of primary jurisdiction:

> ...is not applicable where the issue regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that the courts have original jurisdiction to interpret tariffs, rules and practices where the issue is one of violation, rather than reasonableness. (Emphasis supplied).

The case law is clear that when it comes to the practice of violating a published tariff rate, referral of the issue to the ICC is improper and any decision rendered by the ICC therefrom is considered a nonbinding advisory opinion. **Williams v. AT&T Technologies, Inc. (In re: Silverwheel Freightlines, Inc.)**, Adversary Proceeding No. 85-0743-S (Bkrtcy. D. OR Sept. 11, 1986), **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Pride Health Care Equipment**, Civil No. 87-0915 (M.D. PA Nov. 18, 1987), 1988 Fed. Carr. Cas. (CCH) para. 83,345 (1987).

As stipulated, both Defendants were aware of the obligation to pay the Debtor its filed tariff and without further thought acted as if there was no such obligation. Certainly, if the Defendants genuinely desired to deal with the Debtor as a contract carrier,

they should have been willing to sign written bilateral contracts with the Debtor. Alternatively, the Defendants could have verified the rates they desired to pay by requiring the Debtor provide a copy of its tariff to them prior to their tendering freight to the Debtor.

The Court in **West Coast** was faced with a similar argument raised by a shipper who had "negotiated" a rate with a motor carrier and was now seeking relief from the undercharge suit brought by the carrier. In response, Judge Patel stated:

> Here there is no evidence the shipper has sought relief directly, from the ICC nor did it institute its own action. Referral at this stage would encourage the shipper who has received the advantage of a lower rate to wait and see whether the carrier will attempt to recover the undercharge and only then assert his unreasonable practice claim. This flies in the face of the statute and its clear purpose.

Id., at p. 58,488-89.

Recent Court Decisions Affirm That The Motor Carrier Act of 1980 Did Not Change The Strict Requirements of the Filed Rate Doctrine

Although the ICC in **Ex Parte** No. MC-177 looks to the Motor Carrier Act of 1980 (P.L. 96-296, July 1, 1980), to justify "equitable" defenses, the 1980 Act did not change the strict requirements of 49 U.S.C. Section 10761(a). This was recently made clear by the Supreme Court in **Square D Co. v. Niagara Frontier Tariff Bureau**, -- U.S. --, 106 S. Ct. 1922 (1986).

In **Square D**, the Supreme Court revisited the filed rate doctrine in an anti-trust context and concluded that the 1980 Motor Carrier Act did not alter the statutory requirements and consequences. In that case, the Court

quoted with approval from **Koegh v. Chicago & Northwestern R. Co.**, 260 U.S. 156 (1922), thus:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carriers and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Square D. v. Niagara, -- U.S. --, 106 S. Ct. at 1927.

The ICC's policy statement attempts to distinguish Square D on the grounds that it merely holds that carriers must file rates and not that the ICC is precluded from declaring unreasonable the collection of the filed rate. **Ex Parte** No. MC-177, 3 I.C.C. 2d at 108. Such a conclusion is in direct opposition to that reached by the 8th Circuit in **Paulson v. Greyhound Lines**, supra, where the 8th Circuit affirmed a

district court decision that special agreements of the parties cannot, as a matter of law, alter the requirements of a published tariff. Significantly, the court in **Paulson** relied specifically on **Square D** in upholding the vitality of the filed rate doctrine. Additionally, the semantics used by the ICC are not persuasive. **Square D** states that the filed rate is the governing rate. Unless the rate itself is found unlawful, it must be collected. The requirements of Section 10761 are meaningless if the filed rate need not be collected. The filed rate doctrine mandates collection of a lawful tariff rate absent a finding that the rate is itself unlawful, and the ICC has no power to waive the Act's requirements.

In **R.C.C.C. v. U.S.**, 793 F.2d at 379 the D.C. Circuit found the ICC without

statutory authority to waive the requirements of 49 U.S.C. Section 10761(a) stating:

> That requirement [for a rate to be contained in a tariff] is utterly essential to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory, see 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, see 49 U.S.C. Sections 10708(a)(1) & 11701(a).

In **Motor Carrier Audit & Collection Co. v. United Food Service, Inc.**, 1987 Fed. Carr. Cas. (CCH) para 83,326 (D. Colo. 1987), the Court after a thorough recitation of the filed rate doctrine and an in-depth analysis of the Commission's decision in **Ex Parte No.** MC-177 concluded:

> As the ICC itself admits, 'the commission does not have jurisdiction over claims challenging the reasonableness of motor carrier rates

> charged in the past nor authority to order the waiver of undercharges.' Id. at 4. Rather, it can only provide the courts with an advisory opinion as to whether a shipper should be allowed to assert equitable defenses to a carrier's claim. **While the ICC may so advise a court, it is difficult to understand how, in the light of clear precedent establishing that equitable defenses are not generally available, a court could adopt the ICC's recommendation that a defendant be allowed to assert those defenses.** (Emphasis supplied.)

Id. at p. 58,434.

The Court in **Motor Carrier Audit** readily distinguished **Seaboard System R.R. v. U.S.**, 994 F.2d 635 (11th Cir. 1986) the case most heavily relied upon by the ICC in Ex Parte MC-177, as dealing with a confusing tariff and limited to those cases where the ICC had original jurisdiction over the case (i.e., where an administrative complaint was filed with the ICC). Moreover, the **Seaboard System** case was a railroad case wherein the ICC has

jurisdiction to award monetary reparations. In motor carrier cases, however, the ICC does not have jurisdiction to order the waiver of undercharges or award reparations. See 49 U.S.C. 11706(c)(2).

There have been numerous other recent U.S. District Court decisions denying defendants' motions to refer their cases to the ICC because the ICC is not capable of rendering a legally binding decision allowing the waiver of undercharges. See **Feldspar Trucking Company, Inc. v. Greater Atlanta Shipper, Inc.**, 1988 Fed. Carr. Cas. (CCH) para. 83,350 (N.D. Ga. 1987); **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Cuisinarts, Inc.**, C.A. No. H-87-424 (AHN) (D. Conn. Oct. 28, 1987); **Delta Traffic Service Service Inc. amd Oneida Motor Freight, Inc. v. Personality Plastics, Inc.**, C.A. No.

CV-87-2323 (E.D. N.Y. Oct. 7, 1987); **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Keystone Lighting Corporation**, C.A. No. 87-3659 (E.D. PA Sept. 24, 1987); and **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Occidental Chemical Corporation**, C.A. No. 87-4217 (E.D. PA August 18, 1987).

Other Courts have also determined that referral to the ICC in cases raising similar "equitable" defenses to freight undercharge actions would be inappropriate and recognized that the filed rate doctrine cannot be overruled by the ICC. **Motor Carrier Audit and Collection Co. v. Medline Industries, Inc.**, Case No. 87-C-6123 (N.D. Ill. Nov. 2, 1987) (declaring **Ex Parte No. MC-177** to be inconsistent with the statute and precedents that bind the Court, and that any equitable defense

that the ICC might recognize cannot take precedence over the filed rate); and **Motor Carrier Audit and Collection Co. v. Casio**, Case No. 87-C-6124 (N.D., Ill. Oct. 27, 1987).

Finally, the Court in **Robert Yaquinto, Jr., Trustee, for Caravan Refrigerated Cargo, Inc. v. Supreme Beef Processors, Inc.**, C.A. 3-87-2274-R (N.D. TX Jan. 20, 1988), in entering summary judgment in favor of the Trustee against a shipper's claim for equitable relief stated:

> First, MC-177 is merely an advisory opinion and as such provides no precedential value. **Pacific Gas & Electric Co. v. F.P.C.**, 506 F.2d 33 (D.C. Cir. 1974). Second, and more fundamentally, an administrative agency cannot overrule the statutory requirements to publish and charge rates as set forth in tariffs. Congress was fully cognizant of the well established interpretation of Section 10761 when it enacted the Motor Carrier Act of 1980, and yet Congress choose not to amend that section.

Id., slip op. at 6.

The Court concluded that:

> Defendant is charged with notice of the properly filed tariffs. Consequently, its arguments of ignorance is unavailing. For this Court to excuse Defendant from compliance with Section 10761 it would be emasculating that section's ability to prevent discriminatory allowances by carriers.

Id.

Conclusion

Courts at the trial level should be very slow to change policy within the framework set out by Congress, and as delineated by the Supreme Court. This is particularly true where such changes could have been easily affected by an Act of Congress in 1980 when Congress was amending the motor carrier portion of the Interstate Commerce Act. However, Congress refused to alter the strict tariff requirements of the Act. Thus, the Court must, without regard to what its opinion is as to what the law

should be, rule with regard to what the law is. And that is, that the "filed rate" doctrine is still the law of the land, and that, without regard to the ingeniousness of the defenses, the Court cannot allow them as they are not allowed by law.

Therefore, the Court finds that the defense of contract carriage is non-existent and reliance by the Defendants on the negotiated rate was not reasonable, and even if it had been found to be reasonable that the "filed rate" doctrine is still the law of the land and that the Plaintiffs should recover judgment in accordance with their actions on matters of the undercharges in the amount of $58,793.03 owed by CCE, and $13,795.73 owed by Reiter.

As to the Defendant that owes accounts receivable not relating to

undercharges, the Court finds in the case of CCE that $4,804.55 is owed and renders judgment on that amount.

As to the subject of attorney's fees and interest, the Court will not approve any attorney's fees or interest on any of the undercharge cases, as the conduct of the parties in this case is such that each should bear its own costs. Interest of course as to the undercharges shall bear the statutory rate of interest from date of the judgment until paid, but not any interest prior thereto. As to the accounts receivable of $4,804.55 with regard to CCE, the Court finds that the tariff provisions with regard to interest and attorney's fees should apply and it is so ordered.

An appropriate judgment reflecting all the above shall be entered.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 89-1662

DELTA TRAFFIC SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

TRANSTOP, INCORPORATED,
Defendant, Appellant.

JUDGMENT

Entered: April 13, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, asnd was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to the district court with instructions to stay proceedings in this case and to refer it to the Interstate Commerce Commission in accordance with the opinion filed this date.

Costs to appellant.

By the Court:

[illegible]; P. [illegible]
Clerk.

[cc: Messrs: Gallagher. Augello. Steinfeld and Burk]

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